RECEIVED
MAR 24 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-

79-6309

RAYMOND ROBERT CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JACK O. JOHNSON
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
CHIEF - APPELLATE DIVISION

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830

ATTORNEYS FOR PETITIONER

RECEIVED
MAR 24 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-

79-6309

RAYMOND ROBERT CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, RAYMOND ROBERT CLARK, asks that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered on November 21, 1979, rehearing denied February 19, 1980.

CITATIONS TO THE OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 379 So.2d 97 (Fla.1980), and is set out in Appendix A.

JURISDICTION

The opinion of the Supreme Court of Florida was filed on November 21, 1979, and is set out in Appendix A. Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3). Petitioner asserted below and is asserting here deprivation of his rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether the trial court erred in denying Petitioner's motion for a statement of particulars of the aggravating circumstances on which the State would rely, infringing upon Petitioner's constitutionally guaranteed rights of due process of law and notice of the charges against him.

II. Whether the trial court can define and control the Petitioner's Sixth Amendment right to a public trial at the expense of his Sixth Amendment rights to effective assistance of counsel and an impartial jury by permitting, over objection, the presence of the electronic media at his trial.

III. Whether the trial court erred in denying the indigent Petitioner's motion for appointment of an expert psychiatrist to aid the defense in the preparation of its case regarding the Petitioner's guilt and regarding potential mitigating circumstances, thereby denying the Petitioner's rights to due process and equal protection.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves Section 921.141(5), Florida Statutes (1977) which are set out in Appendix B.

STATEMENT OF THE CASE

Petitioner was convicted of first degree murder, kidnapping with intent to commit a felony, and extortion in the Circuit Court for Pinellas County, Florida. (R1471-1473) Following the jury's advisory verdict of death, Circuit Judge Robert E. Beach then sentenced Petitioner to death for the murder. He also sentenced Petitioner to a consecutive life term for the kidnapping charge and a consecutive fifteen year term for the extortion charge.

The Florida Supreme Court affirmed the conviction and sentence (although reducing the number of aggravating factors found by the trial court) in an opinion reported at 379 So.2d 97. Petitioner now seeks a review of this judgment in this Court.

Prior to the trial, Petitioner filed and the court denied three motions relevant for purposes of this petition. First, he asked for a statement of particulars of the aggravating circumstances the State intended to rely upon in its request for the imposition of the death penalty. (R991-993, 1093) Second, he asked the court to exclude the television cameras from the courtroom or declare their use unconstitutional. (R1080-1084,1245) Trial counsel objected to its presence and location because of its upsetting effect upon her and its possible prejudicial effect upon the jury. The court, in

response to these objections, merely said that it was bound by the Florida Supreme Court's interim order allowing television cameras in the court. [See In re Petition of Post, Newsweek Stations, Inc., 347 So.2d 402 (Fla.1977)] Finally, Petitioner asked the court to appoint an expert psychiatrist. (R10,180)

The Florida Supreme Court reviewed Petitioner's case and considered the following points on appeal, among others:

> POINT I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A STATEMENT OF PARTICULARS OF THE AGGRAVATING CIRCUMSTANCES ON WHICH THE STATE WOULD RELY, INFRINGING ON THE APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND NOTICE OF THE CHARGES AGAINST HIM.
>
> POINT II. THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO EXCLUDE TELEVISION CAMERAS FROM THE COURTROOM DURING TRIAL DUE TO THEIR DISTRACTIVE EFFECT ON THE ATTORNEYS AND JURORS ESPECIALLY WHERE THE CAMERAS WERE FACING THE JURORS AND THE JURORS WERE IN FACT TELEVISED.
>
> POINT III. THE TRIAL COURT ERRED IN DENYING THE INDIGENT APPELLANT'S MOTION FOR APPOINTMENT OF AN EXPERT PSYCHIATRIST TO AID THE DEFENSE IN THE PREPARATION OF ITS CASE REGARDING THE APPELLANT'S GUILT AND REGARDING POTENTIAL MITIGATING CIRCUMSTANCES, THEREBY DENYING THE APPELLANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

In the opinion filed in Petitioner's case the Florida Supreme Court held that:

1. His motion for a statement of particulars was properly denied. Clark, supra, at 104.

2. Television cameras were properly admitted in the courtroom, and, in any event, Petitioner had not shown any prejudice by their presence. Id., at 103.

3. Petitioner had asked for a psychiatrist only as to the possible defense of insanity and had waived appointment for any other use. Id., at 103.

REASONS FOR GRANTING CERTIORATI

I.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHERTHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR A STATEMENT OF PARTICULARS OF THE AGGRAVATING CIRCUMSTANCES ON WHICH THE STATE WOULD RELY, INFRINGING UPON PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHT OF DUE PROCESS OF LAW AND NOTICE OF THE CHARGES AGAINST HIM.

Under the concept that our criminal justice system is an evolving process, the Petitioner asks this Honorable Court to examine his contention that our notions of fair play and justice now require prosecutors to disclose what aggravating factors they plan to use to condemn him to die. When placed in context of this evolutionary process, his contention is neither shocking or inconsistent with prior decisions of this Court.

For example, in Brady v. Maryland, 373 U.S. 83 (1963) this Court concluded that justice was best served when the procecution was required to reveal any exculpatory material to the defense. Likewise, fair play required that the defense reveal to the prosecution any alibi they may have intended to rely upon.

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. (footnote ommitted.) Williams v. Florida, 399 U.S. 78, 82 (1970).

In death cases, this evolutionary process has been accelerated because death, in its finality, is different. Gregg v. Georgia, 428 U.S. 153 (1976). Thus, fair play and the demands of justice are strictly applied to insure no man dies because of surprise or caprice. Rationality and consistency in the sentencing process, are the keys to be used to examine the death penalty cases. Proffitt v. Florida, 428 U.S. 242, 258-259 (1976).

Accordingly, this Court in Gardner v. Florida, 430 U.S. 349, 359 (1977) said that the court must inform the defendant of all material he used in sentencing the defendant to death because in some instances the judge's decision of whether the defendant should live or die may depend upon such information.

Underlying all these cases and particularly relevant in death cases is the philosophy that justice is best served when the prosecution acts in the sunshine instead of hiding its secrets in the closet until trial or sentencing. Moreover, in death cases, every effort must be made to insure that arbitrariness and caprice are removed. If death is given, it is imposed only upon a rational decision that on the balance the aggravating factors outweigh mitigating factors. Trial tactics and surprise have no part in a sentencing of such magnitude.

This case is a prime example of what happens when there is no disclosure of aggravating circumstances. In justifying imposing death upon Petitioner, the trial court impermissibly doubled two aggravating factors. Clark, supra, at 104. While the Florida Supreme Court caught the mistake, nevertheless, with prior knowledge of the aggravating factors

relied upon by the State, defense counsel may have been able to avert this error and effectively rebut their use as aggravating factors.

With a man's life depending upon what those factors are, our sense of justice requires that he be given advance notice of them so he can at least prepare to meet them at trial.

II.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT CAN DEFINE AND CONTROL THE PETITIONER'S SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL AT THE EXPENSE OF HIS SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND AN IMPARTIAL JURY BY PERMITTING, OVER HIS OBJECTION, THE ELECTRONIC MEDIA TO PRESENT AT HIS TRIAL.

If the Petitioner's right to a public trial is a right personal to himself, can he control how public the trial will be? Once he has asserted that right has he lost all control over "how public" it will be? Or can he move the court to exclude the electronic media because of trial counsel's apprehension at their presence?

In Gannett-Press v. Despaquale, ___ U.S. ___, 61 L.Ed.2d 608 (1979), this Court held that the Sixth Amendment's guarantee of a public trial is personal to the accused. Id., at 623. That is, the public at large cannot assert this right. Id., at 622. This Court, however, expressly refused to rule on the issue of whether a defendant's right to a public trial also implied that he has the opposite right to insist upon a private or secret trial.

> The question in this case is not, as the dissenting opinion repeatedly suggests, post, at ___, 61 L.Ed.2d ___, whether the

Sixth and Fourteenth Amendments give a defendant the right to compel a secret trial. Id., 626, fn 11.

The question presented here falls between the issue as framed by the opinion of the court in Gannett and the dissent in that opinion. Petitioner was granted a public trial, but wanted to retain some control over the extent of its publicity by excluding only the electronic media. This issue is particularly crucial to Petitioner, as his counsel was especially unnerved by the camera's presence. (R2950-2951) Likewise, the position of the camera being conspicuously located to the jury (R2950) may have had some impact upon the jury's analysis of the trial evidence. Petitioner's counsel, in short, objected not only to the camera's placement, but its very presence.

The trial court, however, rejected these claims, saying that it had no discretion as to the presence of the cameras and that counsel would "get use to" them. (R2953) Likewise, the Florida Supreme Court said that Petitioner had failed to demonstrate any specific denial of due process by the cameras presence. Clark, supra, at 103.

Thus, the issue presented by this case expresses the tension between Petitioner's right to a public trial, the extent to which he or the trial court can control just "how public" it will be, and his Sixth Amendment rights to assistance of counsel and an impartial jury. Petitioner, in short, sought to "compel a secret trial" only to the extent that he wanted to protect his Sixth Amendment right to assistance of counsel and an impartial jury.

POINT III.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT ERRED IN DENYING THE INDIGENT PETITIONER'S MOTION FOR APPOINTMENT OF AN EXPERT PSYCHIATRIST TO AID THE DEFENSE IN THE PREPARATION OF ITS CASE REGARDING THE PETITIONER'S GUILT AND REGARDING POTENTIAL MITIGATING CIRCUMSTANCES, THEREBY DENYING THE PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

This case, by posing the question presented, seeks to inquire whether the rationale underlying Gideon v. Wainwright, 372 U.S. 335 (1963) and Griffin v. Illinois, 351 U.S. 12 (1956) extends the appointment of a psychiatrist to aid defendants in preparation not only of their defense during the guilt/innocence phase of a death penalty trial, but also during the sentencing phase of that trial.

Since Gideon, this Court has recognized that "... lawyers in criminal courts are necessities, not luxuries." Gideon, supra, at 344. There is, of course, no inherent magic in merely having a lawyer present during trial. To the contrary, it is his knowledge, experience and abilities that are thought so vital to a fair trial of the criminally accused. But, unless counsel has the tools or means to give expression to his expertise, appointment of counsel means little, and in fact, exalts the formality of appointing counsel over the substance of providing effective legal assistance.

In Florida, capital cases involving the death penalty are unique. Death penalty trials from the outset are treated differently. Appointed defense counsel representing an indigent are usually seasoned veterans who spend far more time investigating and preparing death cases than they do on non-death cases. Moreover, the Florida Legislature has enacted elaborate

special procedures applicable only in death cases to insure that whatever sentence is imposed is not arbitrarily or freakishly given. Proffitt v. Florida, 428 U.S. 242, 252-253 (1976). In the sentencing phase of the trial, moreover, the court is not limited to any specific category of mitigating factors. Lockett v. Ohio, 438 U.S. 586 (1978). In order to determine the appropriateness of death, the sentencing court must consider as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Id., at 608.

But for all the attention and special care given to death cases, it means nothing if an indigent's counsel is limited in the matters he can investigate and ultimately present to a judge and jury. For example, in an earlier murder charge a psychiatrist had said that Petitioner was incompetent to stand trial. (R1490-1491) His earlier suicide attempts, pedophillia and the facts surrounding this murder certainly indicate something was and is wrong with him. Because Petitioner, a poor man, could not afford to hire a psychiatrist that a wealthy person may have engaged, he was unable to investigate whatever facts may have been present to support his claims in mitigation. Hence, he was denied equal protection of the law.

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Griffin, supra, at 19.

Thus, this case proceeds from the foundation laid by Gideon and asks this Court to examine whether an indigent defendant can be effectively represented by counsel if a

psychiatrist is not appointed to assist him in a death case in preparing his defense in both the guilt/innocence and sentencing phases of his trial.

CONCLUSION

Therefore, the Petitioner asks this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

JACK O. JOHNSON
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

By: P. Douglas Brinkmeyer
P. DOUGLAS BRINKMEYER
Assistant Public Defender
Chief - Appellate Division

DAVID A. DAVIS
Assistant Public Defender

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg., 1313 Tampa Street, 8th Floor, Tampa, Florida 33602, by mail this 20 day of March, 1980.

P. Douglas Brinkmeyer
P. DOUGLAS BRINKMEYER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-

RAYMOND ROBERT CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDICES
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

INDEX

		PAGES
Appendix A:	Clark v. State, 379 So.2d 97 (Fla.1980)	1a-1h
Appendix B:	Copy of Section 921.141, Florida Statutes	2a-2b

That portion of the decision of the district court of appeal which reverses the judgment of guilt for second degree murder is quashed and the cause is remanded with instructions to affirm the judgment and sentence for second degree murder and reconsider the judgment and sentence for robbery. See *State v. Pinder*, 375 So.2d 836 (1979).

It is so ordered.

ENGLAND, C. J., and BOYD, OVERTON and ALDERMAN, JJ., concur.

Raymond Robert CLARK, Appellant,
v.
STATE of Florida, Appellee.

No. 52716.

Supreme Court of Florida.

Nov. 21, 1979.

Rehearing Denied Feb. 18, 1980.

Defendant was convicted in the Circuit Court, Pinellas County, Robert E. Beach, J., of first-degree premeditated murder, kidnapping and extortion and was sentenced to death. Defendant made direct appeal to the Supreme Court. The Supreme Court held that: (1) the verdict was not contrary to the weight of the evidence; (2) trial court did not err in denying defendant's motion for a new trial on the basis of newly discovered evidence; (3) trial court did not commit reversible error in denying defendant's motion to allow jury to retire from deliberations after they had deliberated for a long period of time without a break; (4) trial court did not erroneously limit cross-examination of State's key witness; (5) State could elicit testimony relating to defendant's refusal to give voice exemplars; (6) compilation of a list of illnesses and disabilities which may disqualify a potential juror from service did not require exclusion of the entire jury panel; and (7) imposition of death penalty was proper.

Affirmed.

1. Criminal Law ⇐1159.2(5)

Weight of evidence is ordinarily a matter which falls within exclusive province of jury to decide and Supreme Court will not reverse a judgment based upon a verdict returned by a jury when there is competent evidence which is also substantial in nature to support jury's verdict.

2. Extortion and Threats ⇐22
Homicide ⇐253(1)
Kidnapping ⇐5

Verdict of guilty on counts of first-degree premeditated murder, kidnapping and extortion was not contrary to weight of evidence in case in which evidence given by key witness who was coperpetrator contained no discrepancies and was corroborated by witness identification of defendant's vehicle and of defendant's physical features and voice.

3. Criminal Law ⇐938(1), 1156(3)

A motion for a new trial based on newly discovered evidence is addressed to sound discretion of trial court and only rarely will its determination be disturbed.

4. Criminal Law ⇐938(1)

A new trial will not be awarded on basis of newly discovered evidence unless evidence was discovered after trial, due diligence was exercised to have such evidence at former trial, evidence goes to merits of cause and not merely to impeach a witness who testified, evidence is not cumulative, and it is such that it probably would have changed verdict.

5. Criminal Law ⇐938(1)

Motion for new trial after convictions of first-degree premeditated murder, kidnapping and extortion based on newly discovered evidence in form of a letter from a former cellmate of defendant's coperpetra-

tor stating that coperpetrator had told him that he had shot victim was properly denied where evidence was of an inherently noncredible nature, merely went to impeach credibility of coperpetrator who had testified that defendant had killed victim, and defense had similar information at time of trial but elected not to present such evidence to jury.

6. Criminal Law ⇐865(2)

Trial court in prosecution for first-degree premeditated murder, kidnapping and extortion did not abuse its discretion in denying defendant's motions to allow jury to retire from its deliberations made after nine hours of jury deliberation and renewed two hours later where defendant failed to demonstrate how he was denied a fair trial by an impartial jury on basis of length of time jury deliberated.

7. Witnesses ⇐327

In prosecution for first-degree premeditated murder, kidnapping and extortion, trial court's sustaining State's objection to defense counsel's questioning of State's key witness as to whether he had ever been treated by a psychiatrist or psychologist did not erroneously limit defendant's cross-examination of that witness where there was no information as to what psychiatrist's tests showed or how they would dispute witness' credibility.

8. Criminal Law ⇐393(1)

Fifth Amendment offers no protection against compulsion to submit a voice exemplar and does not privilege refusal to submit, and thus admission into evidence of defendant's refusal to give voice exemplars was not error. U.S.C.A.Const. Amend. 5.

9. Jury ⇐33(1)

Compilation of a list of illnesses and disabilities which may disqualify a potential juror from service did not systematically or intentionally exclude any economic, social, religious, racial, political, or geographical group, and is not grounds for excluding entire jury panel. West's F.S.A. § 40.01(3).

10. Constitutional Law ⇐268(2)

Cameras in the courtroom are not a p se deprivation of defendant's due proce rights. U.S.C.A.Const. Amend. 14.

11. Criminal Law ⇐618

Trial court did not abuse its discreti in denying defendant's motion for seve ance of extortion charge from murder a kidnapping charges and consolidation of o fenses did not prejudice defendant's rig to a fair trial, in case in which some ev dence relevant to extortion charge would admissible at trial on murder and kidna ping charges.

12. Costs ⇐302.4

Trial court did not err in denying d fendant's request that court appoint a pa ticular psychologist to examine defenda and to test him to determine whether possible defense of not guilty by reason insanity existed and to make his repo confidential and solely to defendant's cou sel for his determination of whether or n to make sanity an issue at trial since d fendant refused to move for a sanity inqu sition and to comply with requirements rule governing such matters." 33 West F.S.A. Rules of Criminal Procedure, ru 3.210.

13. Homicide ⇐354

Defendant who was convicted of firs degree premeditated murder, kidnappi and extortion and sentenced to death w not entitled to a statement of particulars to aggravating circumstances upon whi State would rely and present evidence of support its request for death penalty.

14. Costs ⇐302.4

Defendant who was convicted of firs degree premeditated murder, kidnappi and extortion and sentenced to death w not entitled to have a psychiatrist appointe to assist him in establishing mitigating ci cumstance of commission of crime whi under extreme mental or emotional distu bance where no such request was made trial court.

15. Homicide ⇐354

In sentencing defendant convicted of first-degree premeditated murder, kidnapping and extortion to death, trial court erred in finding as two separate aggravating circumstances that murder was committed during a robbery and that murder was committed for pecuniary gain and in finding as two separate aggravating circumstances that victim was killed in order to eliminate him as a witness to robbery and that murder was committed to hinder law enforcement, but such doubling-up of aggravating circumstances did not require resentencing where there remained several aggravating circumstances to support imposition of death penalty.

Jack O. Johnson, Public Defender, and James R. Wulchak, Asst. Public Defender, Bartow, for appellant.

Jim Smith, Atty. Gen. and Richard G. Pippinger, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Raymond Robert Clark was adjudged guilty of murder in the first degree and was sentenced to death. His conviction and sentence of death are before this Court on direct appeal pursuant to article V, section 3(b)(1), Florida Constitution. Clark also appeals his convictions of kidnapping and extortion.

Clark raises several points on appeal which relate to his convictions. These include whether the trial court erred in denying his motion for a new trial on the basis that the verdict was contrary to the weight of the evidence; whether the trial court erred in denying his motion for a new trial on the basis of newly discovered evidence; whether the trial court committed reversible error in denying his motion to allow the jury to retire from deliberations where they had deliberated for a long period of time without a break; whether the trial court erroneously limited cross-examination of the State's key witness; whether error was committed when the State was permitted to elicit testimony relating to Clark's refusal to give voice exemplars and when the jury was instructed concerning Clark's refusal; whether it was error to deny Clark's motion to exclude the entire jury venire; whether the trial court erred in denying Clark's motion to exclude cameras from the courtroom; whether the court erred in not severing the extortion charge from the murder and kidnapping charges; and whether the court erred in denying Clark's motion for appointment of a certain psychologist. For the reasons which follow, we find that none of these issues have merit and, therefore, affirm the convictions. Clark raises five issues which relate to the sentencing phase of his trial. These are whether the court erred in denying Clark's motion for a statement of particulars of the aggravating circumstances on which the State would rely; whether a psychiatrist should have been appointed to assist him in establishing the mitigating circumstance of commission of the crime while under extreme mental or emotional disturbance; whether section 921.141, Florida Statutes (1975), restricts the mitigating circumstances to be considered; whether the trial court improperly doubled up certain aggravating circumstances; and whether the trial court erred in failing to find mitigating circumstances. We find merit only with his contention that the trial court erroneously doubled up aggravating circumstances; however, because we determine that the trial court correctly concluded that there are no mitigating circumstances, we hold that this error does not require reversal of the death sentence.

Raymond Clark first met his accomplice, Ty Johnston, in California when Johnston was fourteen years old and was living at a juvenile group home. Clark, who was then thirty-four, lived with Johnston in California for two years prior to the murder. He fed, clothed, and sheltered Johnston and introduced himself as Johnston's father, but, in fact, the pair had a homosexual relationship. Clark was the first and only person with whom Johnston had a homosexual relationship. Because the group home was being closed down and Johnston would have to move to a juvenile detention center,

Clark decided to take Johnston to St. Petersburg, Florida, where the two of them moved in with Clark's girl friend.

Because he was in need of money, Clark formulated a plan to kidnap someone at a bank and to demand money from that person. In furtherance of Clark's plan, on April 27, 1977, Clark and Johnston drove into several bank parking lots looking for a victim. Clark was armed with a .38 caliber pistol. They finally parked Clark's Chevrolet Blazer in the parking lot of a bank next to a white Cadillac and awaited the return of the owner of the Cadillac. The victim was a forty-nine-year-old businessman who had been to the bank to arrange a real estate closing. When he returned to his automobile, the victim was ordered by Clark to get into his own car. Clark then got into the passenger's side of the vehicle and ordered the victim to drive to several different locations in search of a deserted area. Johnston followed in Clark's Blazer. After an hour and a half of driving, the victim was finally directed to park his automobile in a secluded spot where he was ordered at gunpoint to get out of the vehicle. Clark commanded him to disrobe with the exception of his undershorts and then forced him to write a check on his personal account, payable to cash, in the amount of five thousand dollars. Clark proceeded to tie the victim's hands behind his back with wire and then asked Johnston whether he wanted to shoot the victim. Johnston replied that he did not. Clark then marched the victim into the bushes, made him kneel down, and shot him twice in the back of the head. When the victim's body was later found, his undershorts were down around his knees.

Clark, driving the Cadillac, and Johnston, driving the Blazer, drove back to Clark's girl friend's residence where they left the Blazer. They proceeded to the bank in the victim's Cadillac to cash the check. At the bank, Clark attempted to cash the check, but the teller refused. The Cadillac was then driven to a secluded location where Clark and Johnston wiped it down to eliminate any fingerprints.

Thereafter, concerned that he could face kidnapping charges for taking Johnston, a minor, from California, Clark drove Johnston back to California on the same day as the murder. Several days later Johnston went to live with his parents in California.

On May 9, 1977, before the victim's body had been found, Detective San Marco received a telephone call from a man, whom he testified sounded like Clark, inquiring as to the status of the police investigation relating to the disappearance of the victim. Thereafter, Clark made several threatening phone calls to the victim's son demanding ten thousand dollars for his father's safe return. In these phone calls, Clark described several items contained in the victim's car, including a V-neck tee shirt which he had used to wipe the fingerprints from the car and which had not been mentioned in newspaper accounts which had described the articles of clothing found in the victim's car. Several of these phone calls were traced to Clark's girl friend's residence. This residence had been placed under police surveillance. At the times the calls were made from this residence, there is evidence to place Clark in the residence, and at the time the calls were placed outside this home, there is evidence to show that Clark had gone out.

During the investigation of these extortion threats, the police developed the identity of Clark's accomplice, Ty Johnston, whom they brought back to Florida. Johnston described the kidnapping and murder and Clark's primary role in the incident and led the police to a wooded area where they found the victim's badly decomposed body lying face down in a patch of palmettos with two bullet wounds in the back of his head, with his hands wired behind his back, and with his undershorts down around his knees.

Clark was charged with first-degree premeditated murder, kidnapping and extortion. At trial, Ty Johnston described in detail Clark's role in the murder and kidnapping. Clark presented no defense. The jury returned a verdict of guilty on all three counts.

Analogizing this case to *Tibbs v. State*, 337 So.2d 788 (Fla.1976), Clark initially argues that the testimony of the State's key witness was unreliable and unworthy of belief and that the trial court erred in denying his motion for a new trial on this basis. He contends that the principal evidence against him came from a co-perpetrator, who had an interest in the outcome of the case, who lied to save himself, and who lied out of vindictiveness.

This case, however, is not at all analogous to *Tibbs v. State* wherein it appeared clearly from the record that the uncorroborated testimony of the victim of the crime was inherently unreliable. In *Tibbs*, the only identification witness was under the influence of marijuana at the time of the crime and had never seen the defendant before the day of the crime; there was a real question as to the identification procedure first used by the police; the vehicle connected with the crime was never found; there were discrepancies in the testimony of the State's witness relating to material elements of the case; and Tibbs put on a defense. The features, which we found cast doubt on the believability of the victim in *Tibbs*, are not present in this case.

[1] The weight of the evidence is ordinarily a matter which falls within the exclusive province of the jury to decide, and we will not reverse a judgment based upon a verdict returned by a jury when there is competent evidence which is also substantial in character to support the jury's verdict. *Tibbs v. State*; *McNeil v. State*, 104 Fla. 360, 139 So. 791 (1932).

[2] There are no discrepancies in the essential facts of Johnston's testimony. There is no question as to the identification of Clark or the fact that Clark's Blazer was identified as being in the bank's parking lot at the precise time that the victim was abducted. The teller at the bank testified that, when Clark put on his sunglasses, he looked like the person who attempted to cash the victim's check of five thousand dollars. She stated that the build of his face, his height, his weight, the hair on his arms, his beard, his long hair, and the way his glasses fit on his head looked like Clark's features. Detective San Marco testified that Clark's voice sounded the same as the voice of the person who had called him to see how the investigation of the case was developing. The jury found Johnston to be credible and believed his account of the essential elements of the crime. We hold that the trial court did not err in denying Clark's motion for a new trial on this ground since the record contains substantial credible evidence to support the jury verdict.

[3-5] We also find not abuse of discretion in the trial court's denial of Clark's motion for new trial based upon an alleged discovery of new evidence: a letter from a former cell mate of Johnston's stating that Johnston had told him that he had shot the victim. A motion for new trial based on newly discovered evidence is addressed to the sound discretion of the trial court, and only very rarely will its determination be disturbed. *Baker v. State*, 336 So.2d 364 (Fla.1976); *Bell v. State*, 90 So.2d 704 (Fla. 1956). A new trial will not be awarded on the basis of newly discovered evidence unless the evidence was discovered after trial, unless due diligence was exercised to have such evidence at the former trial, unless the evidence goes to the merits of the cause and not merely to impeach a witness who testified, unless the evidence is not cumulative, and unless it is such that it probably would have changed the verdict. *Harvey v. State*, 87 So.2d 582 (Fla.1956); *McVeigh v. State*, 73 So.2d 694 (Fla.1954); *Branch v. State*, 96 Fla. 807, 118 So. 13 (1928); *Hudson v. State*, 353 So.2d 638 (Fla. 3d DCA 1977). The evidence upon which Clark relied to support his motion for a new trial, in reality, was not newly discovered evidence but rather was only a newly discovered witness. This evidence is of an inherently non-credible nature and merely goes to impeach the credibility of a witness. After considering the motion for a new trial, the trial court properly determined that Clark had information of a similar type available to him at the time of trial, but he elected not to present such evidence to the jury. The trial

court also stated that there has been no showing that Clark would use this witness for a similar type of testimony in a new trial and that, in fact, there was no likelihood he would use it. Since the defense had similar information at the time of trial, the trial court correctly did not consider the letter to be newly discovered evidence.

[6] Clark also challenges the denial of his motion to allow the jury to retire from its deliberations. He contends that, because of the lengthy period of deliberation, he was denied a fair trial by an impartial jury, free from outside influences. After nine hours of jury deliberation, Clark requested the court to call the jury back and to permit them to return to their hotel for the evening. He renewed this motion two hours later. Expressing concern that to insert itself into jury deliberation at the times requested would be prejudicial to the defendant and the State because the jury could be at a very critical point in their deliberations, the court denied the first motion and further explained that there was nothing to indicate that the jurors were deadlocked or were not actively engaged in constructive deliberations or that they were tired and wanted to recess. In denying the second motion to recess the jury, the court expressed the view that it was fearful that, if it sent a note to the jury telling them they could break, they might take this as a subtle form of intimidation to arrive at a verdict more hastily than they normally would. The trial court did not abuse its discretion in denying these motions to recess. Clark has failed to demonstrate how he was denied a fair trial by an impartial jury on the basis of the length of time the jury deliberated.

[7] Clark next suggests that the court erroneously limited his cross-examination of Johnston. Defense counsel asked the witness whether he had ever been treated by a psychiatrist or psychologist. The State objected that the testimony was irrelevant, and the trial court sustained the objection. Johnston's competence had not been made an issue. Although Clark contends that this constituted a curtailment of his inquiry into the credibility of a witness and violated his right of confrontation, he does not show how an affirmative answer to this inquiry would in any way affect the truth or falsity of Johnston's testimony. During oral argument, defense counsel conceded that he had no information as to what the psychiatrist's tests showed or how they would dispute Johnston's credibility. The most the jury could have done with an affirmative response to this question was to speculate or conjecture about Johnston's mental condition.

[8] Although acknowledging that the results of the voice exemplar are admissible, Clark next claims that the trial court erred in permitting the State to elicit testimony relative to his refusal to give voice exemplars and in instructing the jury to give the evidence of refusal such weight and consideration as it deserved in light of all the evidence. This point is likewise without merit. Prior to trial, the State filed a motion to compel a voice exemplar on the basis that it had reasonable grounds to believe that certain tape recorded telephone conversations in evidence were made by Clark. The court ordered Clark to give a voice exemplar in the exact words used by the extortionist. Clark refused on the basis that the giving of a voice sample violated his fifth amendment rights, and he was held in contempt. Clark's privilege against self-incrimination would not have been violated by compelling him to speak the words spoken by the extortionist, and therefore his refusal to speak was not an exercise of this right. Since the fifth amendment offers no protection against compulsion to submit a voice exemplar and since it does not privilege refusal to submit, the admission of Clark's refusal into evidence was not error. *See Joseph v. State*, 316 So.2d 585 (Fla. 4th DCA 1975); *Boyer v. State*, 122 So.2d 19 (Fla. 4th DCA 1966); *Higgins v. Wainwright*, 424 F.2d 177 (5th Cir. 1970), *cert. denied*, 400 U.S. 905, 91 S.Ct. 145, 27 L.Ed.2d 142 (1970). Furthermore, we find no error in the trial court's instruction to the jury pertaining to this refusal.

[9] Clark next argues that the trial court erred in not excluding the entire jury panel because some prospective jurors are automatically excluded by the clerk for illnesses or disabilities which he alleges do not constitute physical infirmities as required by section 40.01, Florida Statutes (1977).[1] To effectuate this statute, Pinellas County has compiled a list of illnesses and disabilities which may disqualify a potential juror from service. Clark maintains that the exclusion of these certain classes of people deprived him of a representative cross-section of the community. The trial court disagreed with Clark, found substantial compliance with the statute, and denied the motion for exclusion. We agree with the trial court and find no error in its ruling. There is no suggestion that the selection process in Pinellas County systematically and intentionally excludes any economic, social, religious, racial, political, or geographical group. *See Reed v. State*, 292 So.2d 7 (Fla.1974), *cert. denied*, 419 U.S. 995, 95 S.Ct. 307, 42 L.Ed.2d 268 (1974); *State v. Silva*, 259 So.2d 153 (Fla.1972).

[10] Clark also made a motion to have the rule allowing cameras in the courtroom during his trial declared unconstitutional or, in the alternative, to have the trial court enter an order prohibiting the presence of cameras in the courtroom. This motion was denied. He contends that cameras in the courtroom are a per se deprivation of his due process rights. We find this contention to be without merit. *In Re: Petition of Post-Newsweek Stations, Florida, for Change in Code of Judicial Conduct*, 370 So.2d 764 (Fla.1979). Additionally, Clark has failed to demonstrate any specific denial of due process resulting from the presence of cameras in the courtroom during his trial.

[11] Acknowledging the great measure of discretion accorded trial judges on the question of severance and recognizing that some evidence relevant to the extortion charge would be admissible at trial on the murder and kidnapping charges, Clark asserts that the trial court erred in refusing to sever the extortion charge from the murder and kidnapping charges. We conclude that the trial court did not abuse its discretion in denying the motion for severance and that the consolidation of the offenses did not prejudice Clark's right to a fair trial. *See Smith v. State*, 365 So.2d 704 (Fla.1978); *Ashley v. State*, 265 So.2d 685 (Fla.1972).

[12] Furthermore, the trial court did not err in denying Clark's request for appointment of a psychologist. Although refusing to move for a sanity inquisition and to comply with the requirements of Florida Rule of Criminal Procedure 3.210, Clark requested that the court appoint a particular psychologist to examine Clark and to test him to determine whether a possible defense of not guilty by reason of insanity exists and to make his report confidential and solely to Clark's counsel for his determination of whether or not to make sanity an issue at trial. By his motion, Clark was attempting to circumvent Florida Rule of Criminal Procedure 3.210.

In addition to reviewing the record in light of these alleged errors asserted by Clark, which we have determined to be without merit, we also have reviewed the evidence pursuant to Florida Appellate Rule 6.16 to determine whether the interests of justice require a new trial and conclude that no new trial is required. Accordingly, the convictions are affirmed.

We now consider Clark's challenges to the imposition of the death penalty. The jury recommended that the death penalty be imposed. In ordering that the death penalty be imposed, the trial court found no mitigating circumstances and found the following aggravating circumstances:

A. The Defendant, RAYMOND ROBERT CLARK, was previously convicted in

1. Section 40.01(3) provides:

> In the selection of jury lists only such persons as the selecting officers know, or have reason to believe, are law abiding citizens of approved integrity, good character, sound judgment and intelligence, and who are not physically or mentally infirm, shall be selected for jury duty.

California of Murder in the First Degree, which carried a possible maximum sentence of death. The Defendant was sentenced to life imprisonment for the commission of that crime but was paroled after serving ten (10) years in the California prison system. At the time of the commission of the present homicide, he was on parole from California, but was in violation of that parole by being in Florida.

B. The murder in the present case was committed by the Defendant during the course of a robbery.

C. The victim in the instant case was killed in order to eliminate him as a witness to the robbery.

D. The murder was committed by the Defendant for pecuniary gain.

E. The murder was committed for the purpose of hindering enforcement of the robbery laws of this State.

F. The murder was committed by the Defendant in a cool, callous and heartless manner without mercy or compassion for the victim, and therefore, was an especially heinous, atrocious and cruel crime.

[13] Clark challenges his sentence upon several grounds. His contention that he was entitled to a statement of particulars as to the aggravating circumstances upon which the State would rely and present evidence of to support its request for the death penalty is without merit. *Menendez v. State*, 368 So.2d 1278 (Fla.1979). Furthermore, Clark's argument that Florida's death penalty statute restricts the mitigating circumstances which may be considered was recently dealt with in our decision in *Songer v. State*, 365 So.2d 696 (Fla.1978), wherein we held that Florida's death penalty statute does not violate the eighth and fourteenth amendments to the Constitution of the United States since it does not limit the trial judge to consideration of only the statutorily enumerated mitigating circumstances.

[14] Clark now claims that he was entitled to have a psychiatrist appointed to assist him in establishing the mitigating circumstance of commission of the murder while under extreme mental or emotional disturbance. A review of the record, however, reveals that no such request was made to the trial court, and the trial court was never given an opportunity to rule on whether Clark was entitled to a psychiatrist to assist him in the determination of mitigating circumstances. The motion for appointment of a psychiatrist only requested that a certain psychologist be appointed to examine Clark to determine if a possible defense of not guilty by reason of insanity was available to him.

[15] The State concurs with Clark's contention that the trial court erroneously doubled up certain aggravating circumstances which this Court held was prohibited in *Provence v. State*, 337 So.2d 783 (Fla.1976). We find that the trial court erred in finding as two separate aggravating circumstances that the murder was committed during a robbery and that the murder was committed for pecuniary gain and, in finding as two separate aggravating circumstances, that the victim was killed in order to eliminate him as a witness to the robbery and that the murder was committed to hinder law enforcement. Since we find that the trial court did not err in finding no mitigating circumstances, however, this defect in the trial court's order does not require resentencing. *Hargrave v. State*, 366 So.2d 1 (Fla.1978); *Elledge v. State*, 346 So.2d 998 (Fla.1977). Even with the elimination of the doubling-up of aggravating circumstances, there remain several aggravating circumstances to support the imposition of the death penalty. We find the death sentence to be warranted by the circumstances of this case.

Accordingly, having found no reversible error, we affirm the judgments and sentences.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur.

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.

921.15 Stay of execution of sentence to fine; bond and proceedings.

921.16 When sentences to be concurrent and when consecutive.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.

921.18 Sentence for indeterminate period for noncapital felony.

921.185 Sentence; restitution a mitigation in certain crimes.

921.20 Classification summary; Parole and Probation Commission.

921.21 Progress reports to Parole and Probation Commission.

921.22 Determination of exact period of imprisonment by Parole and Probation Commission.

921.231 Presentence investigation reports.

921.241 Felony judgments; fingerprints required in record.

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19254, 1939; CGL 1940 Supp. 8052(260); s. 121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19254, 1939; CGL 1940 Supp. 8052(267); s. 122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 227a, ch. 19684, 1939; CGL 1940 Supp. 8625.24(4); s. 118, ch. 72-98; s. 1, ch. 73-172; s. 2, ch. 73-726; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 79-124.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 76-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 260a, ch. 19684, 1939; CGL 8438, 8427; CGL 1940 Supp. 8625.27(3); s. 123, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits, shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

History.—s. 261, ch. 19684, 1939; CGL 1940 Supp. 8625.27(1); s. 124, ch.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 79-6309

RAYMOND ROBERT CLARK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JACK O. JOHNSON
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
CHIEF, APPELLATE DIVISION

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830
(813) 533-6715 or 533-1184

ATTORNEYS FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 79-6309

RAYMOND ROBERT CLARK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER
ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner files this Supplemental Brief pursuant to Rule 22.6 to apprise this Court of new factual developments in this cause. On September 29, 1980, an original action was filed in the Supreme Court of Florida on behalf of Petitioner and one hundred twenty-two (122) other death-sentenced defendants, alleging that the Court, since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal.

The information includes but is not limited to: presentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluations or contact notes;

psychological screening reports; recitations of a capital defendant's refusal to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole violation reports; and state prison classification and admissions summaries.

Documentation of the practice was provided in the Appendices attached to the Petition. Copies of the pleadings and the appendices are attached to this Supplemental Brief. Except as to some of the presentence investigations pertaining to the offense on appeal the above information was requested and received without notice to the capital appellants or their attorneys.

It was further alleged that, upon information and belief, a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it, has at the Court's direction been destroyed or purged from the Court's files.

Based upon this original action, the Supreme Court of Florida, on the same date of filing, granted stays of execution for two (2) death-sentenced defendants whose death warrants had been signed by the Governor and who were scheduled to be executed October 8, 1970. The Court has directed the State of Florida to respond to the allegations contained in the Petition by October 14, 1980, and has scheduled oral argument for October 27, 1980.

The issues presented to this Court in the instant Petition for Writ of Certiorari involve the method of review and procedures employed by the Supreme Court of Florida in deciding Petitioner's case on direct appeal. The issues raised in the original action discussed above similarly involve the method of review and procedures employed by the Supreme Court of Florida in its mandatory appellate review of all capital cases.

Respectfully submitted,

JACK O. JOHNSON
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: P. Douglas Brinkmeyer
P. DOUGLAS BRINKMEYER
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg., 1313 Tampa Street, 8th Floor, Tampa, Florida 33602, by mail this 8 day of October, 1980.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Chief, Appellate Division

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830
(813) 533-6715 or 533-1184

Counsel for Petitioner

PDB/DAD:rkm

DISTRIBUTED
APR 30 1980
MAY 8
PAGE 16

RECEIVED
APR 30 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-6309

RAYMOND ROBERT CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JACK O. JOHNSON
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
CHIEF - APPELLATE DIVISION

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830

ATTORNEYS FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-6309

RAYMOND ROBERT CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner, RAYMOND ROBERT CLARK, pursuant to Rule 24, files this supplemental brief in support of his petition for writ of certiorari to the Supreme Court of Florida, filed March 24, 1980.

Petitioner submits this brief to call to the Court's attention the supervening fact that since the filing of the petition, this Court on April 22, 1980 noted probable jurisdiction in the case of Chandler v. Florida, No. 79-1260, on an issue which appears to be common to the second question presented by petitioner, that is, whether petitioner's federal constitutional rights were violated by the televising of his trial over his objection.

Counsel have not yet had time to obtain the statement of jurisdiction in Chandler and therefore are presently unable to advise the Court as to the precise interelationship between the issues raised therein and in the petition for writ of certiorari in this case. Counsel will inform the Court further on the matter by supplemental brief once they have had an opportunity to review the matter further.

Respectfully submitted,

JACK O.JOHNSON
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

By: Peter Douglas Brinkmeyer
P. DOUGLAS BRINKMEYER
Assistant Public Defender
Chief - Appellate Division

DAVID A. DAVIS
Assistant Public Defender

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-6309

RAYMOND ROBERT CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX

INDEX TO APPENDIX

Section 921.141(5), Florida Statutes (1975) (A-1)

Fla. R. Crim. P. 3.210(3), (1979) (A-2,A-2a)

Section 921.141(5), Florida Statutes (1975):

(5) AGGRAVATING CIRCUMSTANCES.—Aggravting circumstances shall be limited to the following:
(a) The capital felony was committed by a person under sentence of imprisonment.
(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuinary gain.
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel.

Fla. R. Crim. P. 3.210(e), (1979):

(e) Insanity as a Defense

(1) When in any criminal case it shall be the intention of the defendant to rely upon the defense of insanity, no evidence offered by the defendant for the purpose of establishing such insanity shall be admitted in such case unless advance notice in writing of such defense shall have been given by the defendant as hereinafter provided.

(2) If the defendant upon arraignment, or prior thereto, notifies the Court that he will rely upon insanity as one of his defenses, then the Court will hear the parties and require the defendant to file, within such time as may be fixed by the Court, a statement of particulars showing as nearly as he can the nature of insanity he expects to prove and the names and addresses of the witnesses by whom he expects to prove such insanity.

(3) Upon the filing of said statement of particulars by the defendant, upon motion of the prosecution, the Court may cause the defendant to be examined, by one or more disinterested, qualified experts, not exceeding three, appointed by the Court, at such time and place as may be designated in the order of the Court, as to the sanity, or insanity, of the defendant at the time of the commission of the alleged offense and subsequent thereto. If the Court does so, the Clerk shall notify the prosecuting attorney and counsel for the defendant of such appointment and shall give the names and addresses of the experts so appointed.

(4) If the trial has not commenced, upon good cause shown for the omission of the notices and procedure as to the defense of insanity, the Court may in its discretion give the defendant ten days to provide such notice and comply with such procedures and the periods of time established by Rule 3.191 shall be extended by any period required to complete the procedures set out in this rule but in no event less than 60 days.

(5) If the trial has commenced, upon good cause shown for the omission of the notices and procedure as to the defense of insanity, and upon motion of the defendant, the Court may, in the interests of justice, declare a mistrial in order to permit the defendant to raise the defense of insanity pursuant to this rule. The periods of time established by Rule 3.191 shall be extended by any period required to complete the procedures set out in this rule and to again schedule the case for trial, but in no event less than 60 days. The defendant's former uncompleted trial shall not constitute former jeopardy.

(6) If the defendant is at large on bail or cited or summoned to appear, the Court, if it finds that the examination cannot be conducted unless the defendant is confined, may take him into custody for purposes of the examination by such experts.

Fla. R. Crim. P. 3.210(a), (1979) con't.:

(7) The appointment of experts by the Court shall not preclude the State or defendant from calling expert witnesses to testify at the trial and in case the defendant is committed to custody by the Court they shall be permitted to have free access to the defendant for purposes of examination or observation. The experts so appointed by the Court shall be summoned to testify at the trial and may be examined by the Court and by counsel for the State and the defendant.

(8) When a person tried for an offense shall be acquitted for the cause of insanity by the jury or the Court, the jury or judge in giving the verdict or finding of not guilty, shall state that it was given for such cause.

(9) When a person tried for an offense shall be acquitted for the cause of insanity, if the Court shall then determine that the defendant presently meets the criteria set forth in section 394.467(1), Florida Statutes (1975), the Court shall commit the defendant to the Department of Health and Rehabilitative Services for involuntary hospitalization, or shall order that he receive outpatient treatment at any other appropriate facility or service on an outpatient basis, or shall discharge the defendant. The Department of Health and Rehabilitative Services shall treat the defendant so committed as any other patient who has been involuntarily hospitalized by civil proceedings, except that proper security precautions shall be taken with respect to said defendant. The Court committing the defendant shall make all determinations relative to continued hospitalization (other than the form of treatment) or release of the defendant.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 79-6309

RAYMOND ROBERT CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDICES FOR SUPPLEMENTAL BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

IN THE

SUPREME COURT OF FLORIDA

CASE NO. 59,732

JOSEPH GREEN BROWN, ALVIN BERNARD FORD, JESSE RAY RUTLEDGE, CARL ELSON SHRINER, DANIEL MORRIS THOMAS, AUBREY DENNIS ADAMS, JR., FRED LYMAN BRUMBLEY, DANIEL L. COLER, VERNON RAY COOPER, GREGORY SCOTT ENGLE, DAVID LIVINGSTON FUNCHESS, ROBERT D. HEINEY, MARVIN E. JOHNSON, LESLIE R. JONES, ROBERT F. LEWIS, BOBBY EARL LUSK, THOMAS McCAMPBELL, CHARLES DWIGHT MESSER, FLOYD MORGAN, DONALD PERRY, JAMES LEROY PHIPPEN, JAMES DAVID RAULERSON, JIMMIE LEE SMITH, WILLIAM GILVIN, BRYAN JENNINGS, RICHARD KING, GREGORY MILLS, ROBERT LEWIS BUFORD, WILLIAM CHRISTOPHER, RAYMOND ROBERT CLARK, ROBERT COMBS, RAYMOND L. DRAKE, EARL ENMUND, WILLIAM JENT, AMOS LEE KING, HAROLD GENE LUCAS, ANTHONY RAY PEEK, RALEIGH PORTER, M.C. RUFFIN, DONALD WALSH, JOHNNY PAUL WITT, STEVEN BEATTIE, McARTHUR BREEDLOVE, ALONZO BRYANT, BOBBY MARION FRANCIS, MARVIN FRANCOIS, LENSON HARGRAVE, RONALD JACKSON, ANTONIO MENENDEZ, THOMAS PERRI, WARDELL RILEY, LEON SCOTT, ROY STEWART, MERLE STURDIVAD, GARY TRAWICK, MANUEL VALLE, JAMES ADAMS, LEVIS LEON ALDRIDGE, ALLEN L. ANDERSON, DAVID ROSS DELAP, WILLIAM DUANE ELLEDGE, GEORGE VICTOR FRANKLIN, WILLIAM LANAY HARVARD, JAMES E. HITCHCOCK, MONROE HOLMES, JOHN P. MAGGARD, NOLLIE LEE MARTIN, WINDFORD MINES, ELDRED LONNIE MOODY, JAMES A. MORGAN, TOMMY LEE RANDOLPH, JAMES FRANKLIN ROSE, PAUL WILLIAM SCOTT, WILLIE CLAYTON SIMPSON, TERRY MELVIN SIMS, HENRY PERRY SIRECI, JR., JOSEPH ROBERT SPAZIANO, JESSE JOSEPH TAFERO, SOLOMON WEBB, WILLIAM GLENN WELTY, WILLIAM MELVIN WHITE, GARY ELDON ALVORD, ANTHONY ANTONE, LUIS CARLOS ARANGO, SAMPSON ARMSTRONG, ELLWOOD BARCLAY, RICHARD BLAIR, BERNARD BOLANDER, STEPHEN TODD BOOKER, THEODORE BUNDY, JOHNNY COPELAND, PRESTON CRUM, WILLIE JASPER DARDEN, BENNIE DEMPS, ERNEST JOHN DOBBERT, HOWARD VIRGIL LEE DOUGLAS, JOHN E. FERGUSON, CHARLES KENNETH FOSTER, ARTHUR FREDERICK GOODE, III, FREDDIE LEE HALL, CARL JACKSON, ELIGAAH ARDALLE JACOBS, THOMAS KNIGHT, JOHN WALLACE LeDUC, PAUL EDWARD MAGILL, ROY McKENNON, DOUGLAS RAY MEEKS, MARK MIKENAS, EDDIE ODOM, TIMOTHY PALMES, CHARLES WILLIAM PROFFITT, MICHAEL SALVATORE, FRANK SMITH, CARL RAY SONGER, WALTER STEINHORST, RUFUS STEVENS, RAYMOND R. STONE, RONALD STRAIGHT, ROBERT A. SULLIVAN, WILLIAM LEE THOMPSON, CHARLES VAUGHT, DAVID LEROY WASHINGTON, JAMES BUFORD WHITE,

Petitioners,

-v.-

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida,

Respondent.

APPLICATION FOR EXTRAORDINARY RELIEF AND PETITION FOR WRIT OF HABEAS CORPUS

Petitioners, through their undersigned counsel, apply to this Honorable Court for relief from their unconstitutional sentences of death and further appropriate relief, and, in support thereof, state:

I.

PARTIES

Petitioners are all death-sentenced inmates presently incarcerated at Florida State Prison in Starke, Florida, whose convictions and sentences were affirmed by or whose appeals are currently pending before this Court. (See Appendix A filed herewith).

Respondent, Louie L. Wainwright, is the Secretary of the Department of Corrections in whose custody the petitioners are detained.

II.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Article V, Section 3(b)(1), (7) and (9) of the Constitution of the State of Florida (1980). See Adams v. State, 380 So2d 421(Fla.1980); Graham v. State, 372 So2d 1363(Fla. 1979); Proffitt v. State, 360 So2d 771(Fla. 1978). Petitioners seek relief in this Court because the issues raised herein involve this Court's appellate review of capital cases and do not involve the proceedings in the trial courts. Petitioners have filed jointly in the interest of judicial economy because of the common issues of law and fact presented. See In Re Baker, 267 So2d 331(Fla.1972).

III.

FACTUAL BASIS FOR RELIEF

This Court, since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The information includes but is not limited to: presentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluations or contact notes; psychological screening reports; recitations of a capital defendant's refusal

to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole violation reports; and state prison classification and admissions summaries. Documentation of the practice is provided by the correspondence attached as Appendix B which is merely exemplary. Petitioners also attach in Appendix C newspaper accounts of the practice. While such accounts are admittedly hearsay, they are well-substantiated by the documents in Appendix B.

Except as to some of the presentence investigations pertaining to the offense on appeal the above information was requested and received without notice to the capital appellants or their attorneys.

Upon information and belief, a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it as alleged in the preceeding paragraph, has at the Court's direction been destroyed or purged from this Court's files. As a result, it is no longer possible for petitioners to identify all of the cases in which such information was requested or received.

IV.

LEGAL CLAIMS

The request or receipt by this Court of undisclosed information in capital cases, as described above, violates inter alia, petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida; the right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 16 of the Constitution of the State of Florida; the Eighth Amendment to the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Florida; the privilege against self-incrimination as guaranteed by the Fifth Amendment to the Constitution of the United States and Article I, Section 9

of the Constitution of the State of Florida; the right to confrontation as guaranteed by the Sixth Amendment and Article I, Section 16 of the Constitution of the State of Florida; and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 2 of the Constitution of the State of Florida.

A. The Due Process Right to Fair Capital Procedures

The practice described above violates Gardner v. Florida, 430 U.S. 349(1977). In Gardner, the United States Supreme Court held unconstitutional the imposition of a death sentence where, in considering what sentence to impose, a Florida circuit court had ordered and relied on a pre-sentence investigation report, portions of which were not disclosed to the parties. The plurality emphasized that, in capital cases,

> it is now clear that the sentencing process as well as the trial iteself, must satisfy the requirements of the Due Process Clause . . . .

Id. at 358 (opinion of Mr. Justice Stevens). It held that due process was denied since "the death sentence was imposed, at least in part, on the basis of information which [petitioner] had no opportunity to deny or explain." Id. at 362. See also Green v. Georgia, 442 U.S. 95, 97(1979) and Presnell v. Georgia, 439 U.S. 14, 16(1978).

Gardner requires a similar conclusion here. The only real difference between Gardner and these cases is that here the secret information was gathered on appeal rather than at trial. Rather than providing a basis on which to distinguish these cases, this fact aggravates the unfairness to petitioners. The preparation of a pre-sentence report is a relatively normal and expectable occurrence in the trial court, and defense counsel might legitimately be expected to be on notice that such an event may happen, and, before Gardner at least, might engender confidential information. No lawyer familiar with Florida statutes, rules and procedures could be expected to anticipate, however, that without notice to the lawyer or the lawyer's client,

this Court would request or receive information dehors the record. Here, certainly no less than in Gardner, it would be a violation of the Fourteenth Amendment's Due Process Clause "to impose the death sentence on the basis of confidential information which is not disclosed to the defendant or his counsel." Gardner v. Florida, supra, 430 U.S. at 358.

It is a further violation of Due Process for this Court to have consulted "evidential facts not spread upon the record," Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292,300(1937), so that "even now we do not know the particular or evidential facts of which the [Court]... took judicial notice and on which it rested its conclusion." Id. at 302.

It is also a violation of due process for an appellate court to rely for disposition of an appeal upon factual grounds other than those relied upon by the trial court. Presnell v. Georgia, supra; Eaton v. City of Tulsa, 415 U.S. 697(1974); Cole v. Arkansas, 333 U.S. 196(1948). To the extent that the affirmance of any of petitioners' cases was affected by information outside the trial record, their due process rights were further violated.

The Court's sua sponte consultation of extra-record materials and information in the consideration of capital appeals contravenes petitioners' fundamental rights to due process of law.

B. The Right to the Effective Assistance of Counsel

The guarantee of the effective assistance of counsel is as applicable on appeal as at trial. Anders v. California, 386 U.S. 738(1967); Ross v. State, 287 So2d 372(Fla.2d DCA 1973); Davis v. State, 276 So2d 846(Fla.2d DCA 1973), aff'd 290 So2d 30(Fla.1974). This right is denied not merely by the denial of counsel but by any hampering "restrictions upon the function of counsel in defending a criminal prosecution in accord with

the traditions of the adversary fact-finding process." Herring v. New York, 422 U.S. 853,857(1975). Accord: Ferguson v. Georgia, 365 U.S. 570(1961); Brooks v. Tennessee, 406 U.S. 605(1972); Geders v. United States, 425 U.S. 80(1976). In Gardner v. Florida, 428 U.S. 908,909(1976) certiorari was granted on both a Sixth and a Fourteenth Amendment question. In its decision, the Supreme Court of the United States held that "[e]ven though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel."[Citing Mempa v. Rhay, 389 U.S. 128(1967) and Specht v. Patterson, 386 U.S. 605(1967)]. Gardner v. Florida, 430 U.S. 349,358(1977). Implementing Gardner, this Court has recognized that counsel must be afforded adequate time to prepare pertinent rebuttal evidence in order for a defendant to be given a meaningful "opportunity to be heard." Barclay & Dougan v. State, 362 So2d 657,658(Fla.1978). This Court's request for or receipt of confidential information, without notice to or access by petitioners and their counsel, violates the petitioners' rights because their counsel are afforded no opportunity to explain, deny, or place in context the information. The exclusion of counsel from the process of weighing such information proceeds from the:

> erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Gardner v. Florida, supra, 430 U.S. at 360. On the appeal of a capital case, no less than at trial, the Sixth Amendment guarantees "the guiding hand of counsel" to a criminal defendant. Powell v. Alabama, 287 U.S. 45,57(1932).

C. The Right to Confrontation

The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." See generally Pointer v. Texas, 380 U.S. 400(1965); Douglas v. Alabama, 380 U.S. 415(1965).

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-243(1895). A defendant's Confrontation Clause rights are not limited to trial of the case but attach wherever evidence is admitted relevant to the issues to be adjudicated. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370, 373(1892). A defendant is entitled to confront the witnesses against him in any proceeding "after the case is called for trial which involves his substantial rights." Hopt v. Utah, 110 U.S. 574, 578(1884). See also Rogers v. United States, 422 U.S. 35, 39-40(1975). The evidence which this Court has received has never been tested by the equivalent of cross-examination, cf. Ohio v. Roberts, ___U.S.___ 100 S.Ct. 2531(1980), and is of a notoriously unreliable sort (See ¶ D. infra). While in some limited circumstances, hearsay reports might be admissible if the prosecution makes a solid factual showing of the preparer's "unavailability" as a witness at the time of trial and if, in addition, the report bears adequate "'indicia of reliability'", Mancusi v. Stubbs, 408 U.S. 204, 213(1972), in the present cases, defense counsel

were unaware of the very existence of the reports that may have affected the appeals in petitioners' cases. There was no opportunity here to confront the reports themselves and the consequences of this Court's request or receipt of the reports, let alone the preparers of the reports.

D. The Eighth Amendment Right to Reliability in Capital Sentencing

In Woodson v. North Carolina, 428 U.S. 280, 305(1976) the Supreme Court recognized that, under the Eighth Amendment "death is a punishment different from all other sanctions in kind rather than in degree." "[T]his qualitative difference between death and other penalities calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604(1978). Accordingly,

> [t]o insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. (Footnote omitted). Beck v. Alabama, ___ U.S. ___, 100 S.Ct. 2382, 2389-90 (1980).

It is hard to conceive of evidence more fraught with danger when considered ex parte than the subjective psychiatric/psychological/correctional reports received by this Court, unsubjected to professional explanation and adversarial cross-examination. Addington v. Texas, 441 U.S. 418(1979); Smith v. Estelle, 602 F.2d 694(5th Cir.1979), cert. granted, 100 S.Ct. 1311(1980). See generally, Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693(1974). As the Supreme Court of the United States stated in Kent v. United States, 383 U.S. 541, 563(1966):

> [T]here is no irrebutable presumption of accuracy attached to staff reports. If a decision on [the sentence of life or death] . . . is 'critically important' it is equally of 'critical importance' that the material submitted to the judge . . . be subjected, within reasonable

> limits . . . to examination, criticism and refutation.

The risk that an appellant may be the victim of inaccurate information is precisely the same here as in Gardner. In a case where a mistake may send an appellant to his electrocution, the risk is simply not a constitutionally acceptable one:

> From the point of view of the defendant [the penalty of death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Id. at 357-358. See also Godfrey v. Georgia, ___U.S.___, 64 L.Ed. 2d 398, 409(1980). In the words of Mr. Justice Overton, "often secrecy is considered the opposite of credibility," Forbes v. Earle, 298 So2d 1, 4(Fla. 1974).

E. The Eighth Amendment Right to Proportionality in Capital Sentencing

The Eighth Amendment requires that the death penalty be applied in accordance with a rational and regular sentencing procedure which takes into account both the nature of the crime and the culpability of the individual offender. Woodson v. North Carolina, 428 U.S. 280, 303(1976). The constitutionality of Florida's capital punishment statute was upheld in 1976 on the explicit assumption that review in this Court would be satisfactory to guard against capricious and disproportionate infliction of the death penalty:

> [M]eaningful appellate review of each . . . [death] sentence is made possible, and the Supreme Court of Florida . . . considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.... in light of the other decisions and determine whether or not the punishment is too great'. State v. Dixon, 283 So2d 1, 10(1973).

Proffitt v. Florida, 428 U.S. 242, 251(1976). The secret use of sentencing evidence by this Court "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v. Ohio, 438 U.S. 586, 605(1978). Accord: Beck v. Alabama, ___U.S.___, 100 S.Ct. 2382, 2389(1980).

The sua sponte request and receipt of evidence by this Court makes it impossible to assure either that the Court's general appellate function or the Court's role as the third step in the "trifurcated" sentencing process will not result in the capricious or disproportionate imposition of the death penalty. The formal record on the basis of which the death sentence is imposed will necessarily be incomplete, with parts of it invisible to counsel, to the trial courts, to the federal courts, and to this Court itself as Justices change over time. This is a constitutional defect, for the handling and treatment of confidential sentencing information in a death case is not simply a matter of this Court's discretion. In Gardner v. Florida, supra, the State argued that "trial judges can be trusted to exercise their discretion in a responsible manner, even though they may base their decisions on secret information." 430 U.S. at 360. The Court expressly rejected this argument as "clearly foreclosed," ibid., by Furman v. Georgia, 408 U.S. 238(1972) and "inconsistent with the basis upon which the Florida capital-sentencing procedure was upheld, Proffitt v. Florida, 428 U.S. at 254," id. at 360 n. 11. The Court recognized an Eighth Amendment right to a full and complete record in order to insure that the death penalty is applied proportionately and non-arbitrarily:

> Since the State must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S. at 250, it is important that the record on appeal disclose to the reviewing court the considerations

> which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia. Gardner v. Florida, supra, 430 U.S. at 361 (footnote omitted).

Further, where this Court opens itself to a major category or kind of information in some cases, but not others, proportionality is precluded.

Where neither the trial records nor this Court's decisions reflect accurately all of the information before the court in deciding capital cases, trial and appellate counsel, trial judges, and federal courts on review are deprived of the necessary basis on which to compare cases and insure that consistent standards are being applied in capital sentencing.

The receipt by this Court of different information in different cases -- information which was not before the trial jury or judge -- has eviscerated the system of checks and balances the trifurcated Florida death penalty structure was designed to guarantee. See Proffitt v. Florida, supra; Miller v. State, 332 So2d 65(Fla. 1976); Messer v. State, 330 So2d 137 (Fla. 1976). It has destroyed the statewide "consistency, fairness, and rationality in the evenhanded operation of the state law" which the Supreme Court of the United States believed to be guaranteed by the Florida capital sentencing procedure when it found that procedure facially constitutional in Proffitt v. Florida, supra, 428 U.S. at 260. The Court's practice thus has prejudiced all capital appellants, both those for whom information may have been received and those for whom it was not.

F. The Right Against Self-Incrimination and the Right of the Assistance of Counsel in Deciding Whether to Exercise that Right

An interview with correctional employees or mental health professionals who are obtaining information from an inmate is fundamentally unlike a court-ordered psychiatric examination after a defendant has himself put his sanity in issue. In the

latter case, the defendant may be deemed to have waived the right to object to such an interview. In the former case, however, the Fifth Circuit has recently held that the State may not interview an inmate without notice and waiver of his rights, when the interview will subsequently be admitted in a capital sentencing proceeding, because the inmate has a Fifth Amendment right to refuse to participate in the interview and a Sixth Amendment right to consult with his counsel concerning whether to be interviewed. Smith v. Estelle, 602 F.2d 694(5th Cir. 1979), cert. granted, 100 S.Ct. 1311(1980).

It appears clear that in the present cases, as in Smith, the death row prisoners were not told that the information derived from interviews conducted by correctional employees or mental health professionals would be forwarded to this Court, nor were they told that they had a right to refuse to participate in the interviews. See Smith v. Estelle, supra at 602 F.2d 707-708. If, under the Fifth Amendment, "a defendant may not be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial." Smith v. Estelle, supra, 602 F.2d at 708, then that right was completely negated here.

Furthermore, petitioners were denied the advice of counsel at a critical stage of the sentencing proceedings in their cases. For, while an attorney may have no right to be present with an inmate during an interview by a psychiatrist, see United States v. Cohen, 530 F.2d 43(5th Cir.1976), the attorney has a highly important role in assisting the inmate to decide whether the inmate should waive his Fifth Amendment rights:

> This is a vitally important decision, literally a life or death matter. It is a difficult decision even for an attorney; it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, of possible alternative strategies at the sentencing hearing. . . For a lay defendant, who is likely to have no idea of the vagaries of expert testimony and its possible role in a capital trial, and who may well find it difficult to understand, even if he is told, whether a psychiatrist is examining his competence, his sanity, his long-term

> dangerousness for purposes of sentencing, his short-term dangerousness for purposes of civil commitment, his mental health for purposes of treatment, or some other thing, it is a hopelessly difficult decision. There is no reason to force the defendant to make it without 'the guiding hand of counsel' Powell v. Alabama, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158(1933).

Smith v. Estelle, supra, 602 F.2d at 708-709. See also Brewer v. Williams, 430 U.S. 387, 398(1977). These petitioners have been deprived of the advice of counsel as to their decisions whether to put their lives in the hands of prison personnel or other agents of the State. "The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." Tomkins v. Missouri, 323 U.S. 485,489 (1945). Just as "a prisoner is not 'to be made the deluded instrument of his own conviction,' 2 Hawkins, Pleas of the Crown(8th ed. 1824),595," Culombe v. Connecticut, 367 U.S. 568, 581(1961)(opinion of Mr. Justice Frankfurter), neither may he be made the deluded instrument of his own execution.

G. Conclusion

The practice of this Court of requesting or receiving undisclosed information in capital cases has infected and prejudicially skewed its review of every death sentence. Under the Florida death penalty scheme, the ultimate safeguard for insuring that the process of imposing death sentences is fair, reliable and even-handed is the appellate review required to be provided by this Court. All capital appellants have suffered from this Court's practice of securing secret information. The capital sentencing process in Florida has been distorted from the form in which it was approved by the Supreme Court of the United States, and has become tainted at its highest and most important judicial level.

When the Court's decision is one involving the

ultimate penalty of death, the Constitution cannot tolerate anything short of full notice and disclosure of any and all facts being fed into the life and death equation. One of the tripartite pillars of the trifurcated sentencing process of Florida has become cracked.

V.

PRAYER FOR RELIEF

Based upon the foregoing, petitioners respectfully request their unconstitutional sentences of death be vacated and that the Court grant such other relief as may be deemed proper.

Respectfully submitted,

MARVIN E. FRANKEL
Proskauer, Rose, Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

ALBERT J. DATZ
SAMUEL S. JACOBSON
Datz, Jacobson and Lembcke
Suite 2902 Independent Square
Jacksonville, Florida 32202

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
JOHN CHARLES BOGER
DEBORAH FINS
JAMES S. LIEBMAN
Suite 2030
10 Columbus Circle
New York, New York 10019

DAVID E. KENDALL
Williams and Connally
Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

ATTORNEYS FOR PETITIONERS:

Joseph Green Brown
Alvin Bernard Ford
Jesse Ray Rutledge
Carl Elson Shriner
Daniel Morris Thomas

MICHAEL J. MINERVA
Public Defender
Second Judicial Circuit of Florida
P.O. Box 671
Tallahassee, Florida 32302

DAVID J. BUSCH
Assistant Public Defender

LOUIS G. CARRES
Assistant Public Defender

MICHAEL M. CORIN
Assistant Public Defender

JUDITH J. DOUGHERTY
Assistant Public Defender

MARGARET GOOD
Assistant Public Defender

THEODORE E. MACK
Assistant Public Defender

CARL S. McGINNIS
Assistant Public Defender

ATTORNEYS FOR PETITIONERS:

Aubrey Dennis Adams, Jr.
Fred Lyman Brumbley
Daniel Coler
Vernon Ray Cooper
Gregory Scott Engle
David Livingston Funchess
Robert D. Heiney
Marvin E. Johnson
Leslie R. Jones
Robert F. Lewis
Bobby Earl Lusk
Thomas McCampbell
Charles Dwight Messer
Floyd Morgan
Donald Perry
James Leroy Phippen
James David Raulerson
Jimmie Lee Smith

JAMES B. GIBSON
Public Defender
Seventh Judicial Circuit of Florida
Volusia County Courthouse Annex
Daytona Beach, Florida 32014

JAMES R. WULCHAK
Assistant Public Defender

ATTORNEYS FOR PETITIONERS:

William Gilvin
Bryan Jennings
Richard King
Gregory Mills

JACK O. JOHNSON
Public Defender
Tenth Judicial Circuit of Florida
495 Carpenter Street
Bartow, Florida 33830

PAUL C. HELM
Assistant Public Defender

DOUGLAS LOCKWOOD
Assistant Public Defender

DAVID DAVIS
Assistant Public Defender

ATTORNEYS FOR PETITIONERS:

Robert Lewis Buford
William Christopher
Raymond Robert Clark
Robert Combs
Raymond L. Drake
Earl Enmund
William Jent
Amos Lee King
Harold G. Lucas
Anthony Ray Peek
Raleigh Porter
M. C. Ruffin
Donald Walsh
Johnny Paul Witt

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
Metro Justice Building
1351 N.W. 12th Street
Miami, Florida 33125

KAREN M. GOTTLIEB
Assistant Public Defender

ELLIOT H. SCHERKER
Assistant Public Defender

BETH C. WEITZNER
Assistant Public Defender

WARREN S. SCHWARTZ
Assistant Public Defender

HOWARD K. BLUMBERG
Assistant Public Defender

ROBERT R. SCHRANK
Assistant Public Defender

BRUCE ROSENTHAL
Assistant Public Defender

ATTORNEYS FOR PETITIONERS:

Steven Beattie
McArthur Breedlove
Alonzo Bryant
Bobby Marion Francis
Marvin Francois

Lenson Hargrave
Ronald Jackson
Antonio Menendez
Thomas Perri
Wardell Riley
Leon Scott
Roy Stewart
Merle Sturdivad
Gary Trawick
Manuel Valle

RICHARD L. JORANDBY
Public Defender
Fifteenth Judicial Circuit of Florida
224 Datura Street/13th Floor
Harvey Building
West Palm Beach, Florida 33401

CRAIG S. BARNARD
Chief Assistant Public Defender

JERRY L. SCHWARZ
Assistant Public Defender

RICHARD B. GREENE
Assistant Public Defender

ELLEN S. MORRIS
Assistant Public Defender

JON MAY
Assistant Public Defender

ATTORNEYS FOR PETITIONERS:

James Adams
Levis Leon Aldridge
Allen L. Anderson
David Ross Delap
William Duane Elledge
George Victor Franklin
William Lanay Harvard
James E. Hitchcock
Monroe Holmes
John P. Maggard
Nollie Lee Martin
Windford Mines
Eldred Lonnie Moody
James A. Morgan
Tommy Lee Randolph
James Franklin Rose
Paul William Scott
Willie Clayton Simpson
Terry Melvin Sims
Henry Perry Sireci, Jr.
Joseph Robert Spaziano
Jesse Joseph Tafero
Solomon Webb
William Glenn Welty
William Melvin White

WILLIAM J. SHEPPARD
Sheppard and Carithers, P.A.
215 Washington Street
Jacksonville, Florida 32202

ATTORNEY FOR PETITIONERS:

Gary Eldon Alvord
Charles Vaught

ANGELO FERLITA
601 Twiggs Street
Suite 203
Tampa, Florida 33602

ATTORNEY FOR PETITIONER:

Anthony Antone

VINCENT J. FLYNN
1414 Coral Way
Miami, Florida 33145

ATTORNEY FOR PETITIONER:

Luis Carlos Arango

ROBERT PYLE
P.O. Box 557
Lake Alfred, Florida 33850

ATTORNEY FOR PETITIONER:

Sampson Armstrong

BARTLEY KENNETH VICKERS
437 E. Monroe Street
Jacksonville, Florida 32202

ATTORNEY FOR PETITIONERS:

Ellwood Barclay
Roy McKennon
Timothy Palmes

GARY SMIGIEL
P.O. Box 5548
Daytona Beach, Florida 32018

ATTORNEY FOR PETITIONER:

Richard C. Blair

G. P. DELLA FERA
2699 Biscayne Blvd., Suite 3
Miami, Florida 33137

ATTORNEY FOR PETITIONER:

Bernard Bolander

STEPHEN N. BERNSTEIN
Assistant Public Defender
P.O. Box 1063
Gainesville, Florida 32602

ATTORNEY FOR PETITIONER:

Stephen Todd Booker

CLIFFORD L. DAVIS
216 W. College Avenue, Suite 121
Tallahassee, Florida 32301

ATTORNEY FOR PETITIONERS:

Theodore Bundy
Johnny Copeland
Walter Steinhorst

WILLIAM H. STONE
798 Montrose Street
P.O. Drawer 520
Clermont, Florida 32711

ROBERT Q. WILLIAMS
Cauthen, Robuck, Cyrus & Hennings
131 W. Main Street
Tavares, Florida 32778

ATTORNEYS FOR PETITIONER:

Preston Crum, Jr.

ROBERT AUGUSTUS HARPER, JR.
735 E. University Avenue
P.O. Box 804
Gainesville, Florida 32602

ATTORNEY FOR PETITIONER:

Willie Jasper Darden

JOHN L. CARROLL
Southern Poverty Law Center
1001 S. Hull Street
Montgomery, Alabama 36104

ATTORNEY FOR PETITIONER:

Bennie Demps

LOUIS O. FROST, JR.
Public Defender
Fourth Judicial Circuit of Florida
Duval County Courthouse, Room 221
330 E. Bay Street
Jacksonville, Florida 32202

WILLIAM P. WHITE, III
Chief Assistant Public Defender

ATTORNEYS FOR PETITIONER:

Ernest John Dobbert

ELLIOTT C. METCALFE, JR.
Public Defender
Twelfth Judicial Circuit of Florida
2058 Main Street
Sarasota, Florida 33577

ATTORNEY FOR PETITIONER:

Howard Virgil Lee Douglas

MICHAEL S. HACKER
Suite 1400
14 N.E. 1st Avenue
Miami, Florida 33132

ATTORNEY FOR PETITIONER:

John E. Ferguson

W. C. McLAIN
Smith, Carter & Ringsmuth
P.O. Box 2446
Ft. Myers, Florida 33902

ATTORNEYS FOR PETITIONER:

Arthur Frederick Goode, III

H. D. ROBUCK, JR.
Cauthen, Robuck, Cyrus & Hennings
131 W. Main Street
Tavares, Florida 32778

MORTON D. AULLS
703 E. Burleigh Boulevard
Tavares, Florida 32778

ATTORNEYS FOR PETITIONER:

Freddie Lee Hall

BILL SALMON
204 W. University Avenue
Suite 8
Gainesville, Florida 32601

LARRY G. TURNER
204 W. University Avenue
Suite 6
Gainesville, Florida 32601

ATTORNEYS FOR PETITIONER:

Carl Jackson

LESTER BALES, JR.
507 8th Street
Zephyrhills, Florida 33599

ATTORNEY FOR PETITIONER:

Eligaah Ardalle Jacobs

FLETCHER N. BALDWIN,JR.
Holland Law Center
University of Florida
Gainesville, Florida 32611

ATTORNEY FOR PETITIONER:

Thomas Knight

JOHN H. HALL
STEVEN KLUGMAN
MITCHELL A. KARLAN
Debevoise, Plimpton, Lyons & Gates
299 Park Avenue
New York, New York 10017

HARRY L. WITTE
1215 Thomasville Road
Tallahassee, Florida 32303

ATTORNEYS FOR PETITIONER:

John W. LeDuc

PATRICK D. DOHERTY
619 Turner Street
Clearwater, Florida 33516

ATTORNEY FOR PETITIONER:

Paul Edward Magill

JUNE RICE
STEPHEN D. STITT
3915 S.W. 18th Street
Gainesville, Florida 32608

ATTORNEYS FOR PETITIONER:

Douglas Ray Meeks

ELLEN M. CONDON
10409 Ojus Drive
Tampa, Florida 33617

ATTORNEY FOR PETITIONER:

Mark Mikenas

J. CRAIG WILLIAMS
335 E. Bay
Jacksonville, Florida 32202

ATTORNEY FOR PETITIONER:

Eddie Odom

KATHRYN EMMETT
8 Pheasant Lane
Stamford, Connecticut 06903

DAVID GOLUB
Silver, Golub & Sandak
733 Summer Street
Stamford, Connecticut 06905

ATTORNEYS FOR PETITIONER:

Charles William Proffitt

PAUL MORRIS
Rivergate Plaza
Suite 711
444 Brickell Avenue
Miami, Florida 33131

ATTORNEY FOR PETITIONER:

Michael Salvatore

PHILLIP JOHN PADOVANO
518 N. Calhoun Street
P.O. Box 527
Tallahassee, Florida 32302

ATTORNEY FOR PETITIONERS:

Frank Smith
Raymond R. Stone

JOSEPH JORDAN
324 Datura Street
Suite 211
West Palm Beach, Florida 33401

ATTORNEY FOR PETITIONER:

Carl Ray Songer

JOHN R. FORBES
817 N. Main Street
Jacksonville, Florida 32202

ATTORNEY FOR PETITIONER:

Rufus Stevens

H. RANDOLPH FALLIN
1239 King Street
Jacksonville, Florida 32205

ATTORNEY FOR PETITIONER:

Ronald Straight

ROY E. BLACK
N.E. Airlines Building
Suite 1402
150 S.E. 2nd Avenue
Miami, Florida 33131

ATTORNEY FOR PETITIONER:

Robert A. Sullivan

HAROLD SOLOMON
Solomon & Mendelow
4299 N.W. 36th Street
Miami Springs, Florida 33166

ATTORNEY FOR PETITIONER:

William Lee Thompson

RICHARD E. SHAPIRO
Southern Prisoners Defense Committee
344 Camp Street, Suite 705
New Orleans, Louisiana 70130

ATTORNEY FOR PETITIONERS:

Charles Kenneth Foster
David Leroy Washington

THOMAS G. MURRAY, JR.
1481 N.W. North River Drive
Miami, Florida 33125

ATTORNEY FOR PETITIONER:

James Buford White

BY: Marvin F. Frankel (by MM)
MARVIN E. FRANKEL

Albert J. Datz (by MM)
ALBERT J. DATZ

Samuel S. Jacobson
SAMUEL S. JACOBSON

Deborah Fins
DEBORAH FINS

David E. Kendall (by DM)
DAVID E. KENDALL

Anthony G. Amsterdam (by DM)
ANTHONY G. AMSTERDAM

Michael J. Minerva
MICHAEL J. MINERVA

David J. Busch (by DM)
DAVID J. BUSCH

Louis G. Carres
LOUIS G. CARRES

Michael M. Corin
MICHAEL M. CORIN

Judith J. Dougherty
JUDITH J. DOUGHERTY

Margaret Good
MARGARET GOOD

Theodore E. Mack
THEODORE E. MACK

Carl S. McGinnes
CARL S. McGINNES

James R. Wulchak
JAMES R. WULCHAK

for P. Douglas Brandemuehl
PAUL C. HEIM

Karen M. Gottlieb (by MM)
KAREN M. GOTTLIEB

Elliot H. Scherker
ELLIOT H. SCHERKER

RICHARD L. JORANDBY

CRAIG S. BARNARD

JERRY L. SCHWARZ

RICHARD B. GREENE

ELLEN S. MORRIS

JON MAY

CLIFFORD L. DAVIS

WILLIAM P. WHITE, III

PHILLIP JOHN PADOVANO

JOSEPH JORDAN (by tel.)

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32304 by hand delivery this 29th day of September, 1980.

Samuel S. Jacobson

SAMUEL S. JACOBSON
of counsel

IN THE SUPREME COURT OF FLORIDA

JOSEPH GREEN BROWN, et al.,

Petitioners

-v.-

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Respondent.

CASE NO. 59,732

APPENDICES TO

APPLICATION FOR EXTRAORDINARY RELIEF AND

PETITION FOR WRIT OF HABEAS CORPUS

APPENDIX A

(Petitioners' Names & Case Numbers)

Joseph Green Brown	#46,925
Alvin Bernard Ford	#47,059
Jesse Ray Rutledge	#48,801
Carl Elson Shriner	#51,749
Daniel Morris Thomas	#51,692
Aubrey Dennis Adams, Jr.	#56,134
Fred Lyman Brumbley	#56,006
Daniel L. Coler	#54,250
Vernon Ray Cooper	#45,966
Gregory Scott Engle	#57,708
David Livingston Funchess	#47,828
Robert D. Heiney	#56,778
Marvin E. Johnson	#56,167
Leslie R. Jones	#56,199
Robert F. Lewis	#50,851
Bobby Earl Lusk	#59,146
Thomas McCampbell	#57,026
Charles Dwight Messer	#49,780
Floyd Morgan	#54,939
Donald Perry	#53,003
James Leroy Phippen	#54,664
James David Raulerson	#47,991
Jimmie Lee Smith	#55,961
William Gilvin	#58,743
Bryan Jennings	#59,299
Richard King	#59,464
Gregory Mills	#59,140
Robert Lewis Buford	#54,010
William Christopher	#55,698
Raymond Robert Clark	#52,716
Robert Combs	#59,425
Raymond L. Drake	#54,580
Earl Enmund	#48,525
William Jent	#58,744
Amos Lee King	#52,185
Harold G. Lucas	#51,135
Anthony Ray Peek	#54,226
Raleigh Porter	#55,841
M.C. Ruffin	#55,684
Donald Walsh	#59,512
Johnny Paul Witt	#45,796
	58,329
Steven Beattie	#56,569
McArthur Breedlove	#56,811
Alonzo Bryant	#53,230
Bobby Marion Francis	#50,127
Marvin Francois	#54,461
Lenson Hargrave	#48,135
Ronald Jackson	#47,269
Antonio Menendez	#49,294
Thomas Perri	#57,142
Wardell Riley	#49,666
Leon Scott	#56,419
Roy Stewart	#57,971
Merle Sturdivad	#59,416
Gary Trawick	#57,077
Manuel Valle	#54,572
James Adams	#45,450
Levis Leon Aldridge	#46,598
Allen L. Anderson	#52,771
David Ross Delap	#56,235
William Duane Elledge	#52,272
George Victor Franklin	#52,971
William Lanay Harvard	#47,052
James E. Hitchcock	#51,108
Monroe Holmes	#48,392
John P. Maggard	#51,614
Nollie Lee Martin	#55,716
Windford Mines	#50,996
Eldred Lonnie Moody	#52,907
James A. Morgan	#53,418
Tommy Lee Randolph	#54,869
James Franklin Rose	#51,724
Paul William Scott	#58,588
Willie Clayton Simpson	#49,681
Terry Melvin Sims	#57,510
Henry Perry Sireci, Jr.	#50,905
Joseph Robert Spaziano	#50,250
Jesse Joseph Tafero	#49,535
Solomon Webb	#58,306
William Glenn Welty	#55,497
William Melvin White	#55,875
Gary Eldon Alvord	#45,542
	57,810
Anthony Antone	#50,240
Luis Carlos Arango	#59,678
Sampson Armstrong	#48,516
Ellwood Barclay	#47,260
Richard Blair	#58,072
Bernard Bolander	#59,333
Stephen Todd Booker	#55,568
Theodore Bundy	#57,772
Johnny Copeland	#57,788
Preston Crum	#57,487
Willie Jasper Darden	#45,056
	45,108
Bennie Demps	#54,249
Ernest John Dobbert	#45,558
Howard Virgil Douglas	#44,864
John E. Ferguson	#55,137
	55,498
Charles Kenneth Foster	#48,380
Arthur F. Goode, III	#51,480
	59,453
Freddie Lee Hall	#54,423
	54,561
Carl Jackson	#48,165
Eligaah Ardalle Jacobs	#49,345
Thomas Knight	#47,599
John Wallace LeDuc	#47,953
Paul Edward Magill	#51,699
Roy McKennon	#54,172
Douglas Ray Meeks	#47,533
	48,080
Mark Mikenas	#49,928
Eddie Odom	#50,575
Timothy Palmes	#52,045
Charles W. Proffitt	#45,541
Michael Salvatore	#48,513
Frank Smith	#57,743
Carl Ray Songer	#45,584
	52,642
Walter Steinhorst	#55,087
Rufus Stevens	#57,738
Raymond R. Stone	#48,275
Ronald Straight	#52,460
Robert A. Sullivan	#44,750
William Lee Thompson	#55,697
Charles Vaught	#52,835
David L. Washington	#50,832
	50,833
	50,850
James Buford White	#54,292

INDEX TO APPENDIX B

		PAGE(S)
Jimmie Lee Jones	Memo of 1-11-75 or 9-11-75	1
Michael E. Provence	Memo of 8-29-75	2
	Order of 9-19-75	3
	Memo of 9-23-75	4
	Order of 9-25-75	5
	Letter of 9-26-75	6
	Letter of 9-29-75	7
Charles D. Messer	Memo of 9-10-75	8
	Petition for Rehearing of 5-10-79	9-17
Clarence R. Purdy	Memo of 9-10-75	18
George T. Vasil	Memo of 9-10-75	19
Ronald Jackson	Order of 12-3-75	20
	Docket Sheet	21-22
David L. Funchess	Memo of 12-15-75	23
	Order of 12-16-75	24
	Letter of 12-18-75	25
Douglas R. Meeks	Letter of 3-22-76	26
	PSR of 3-31-75	27
	Acknowledgment Letter of 3-30-76	28
Benjamin Huckaby	Acknowledgment Card of 3-26-76	29
Franz P. Buckrem	Order of 4-14-76 with Acknowledgment Card of 4-19-76	30
	Letter of 4-16-76 with Acknowledgment Card of 4-15-76	31
	Letter - undated	32
Glen S. Chambers	Memo undated	33
	Order of 5-11-76	34
	Letter of 5-18-76	35
	Letter of 5-18-76	36

		PAGE(S)
Richard H. Gibson	Order of 6-3-76	37
	Letter of 5-12-77	38
Elwood Barclay	Order of 6-7-76	39
	Letter of 6-11-76	40
	Acknowledgment Letter of 6-8-76	41
Jacob J. Dougan	Order of 6-7-76	42
	Letter of 6-11-76	43
	Acknowledgment Letter of 6-8-76	44
Monroe Holmes	Acknowledgment Letter of 6-8-76	45
Mark Mikenas	Letter of 1-21-77	46
	Letter of 2-14-77	47
Rodney W. Malloy	Order of 2-17-77	48
	Letter of 2-17-77	49
	Letter of 2-22-77	50
	Letter of 2-24-77	51
	Acknowledgment Cards dated 2-25-77 and 2-28-77	52
Jesse R. Rutledge	Order of 4-21-77	53
	Letter of 4-21-77	54
	Letter of 5-5-77	55
Fred Lyman Brumbley	Documentation of Telephone Contact of 4-25-77	56
	Order of 9-13-79	57
	Letter of 9-19-79	58
	Letter of 9-26-79	59
Joseph G. Brown	Order of 5-11-77	60
	Letter of 5-11-77	61
	Letter of 5-16-77	62

		PAGE(S)
Robert F. Lewis	Letter of 8-4-77	63
	Letter of 8-22-77	64
	Letter of 8-24-77	65
	Letter of 8-26-77	66
	Letter of 9-7-77	67
	Acknowledgment Letter of 9-8-77	68
Jesse L. Hall	Letter of 10-5-77	69
	Letter of 10-24-77	70
	Acknowledgment Card of 10-27-77	71
Enoch Lewis	Letter of 10-5-77	72
	Letter of 10-24-77	73
Harold G. Lucas	Letter of 10-5-77	74
	Letter of 10-24-77	75
Derrick M. Manning	Letter of 10-25-77	76
	Letter of 11-18-77	77
Arthur F. Goode	Letter of 11-23-77	78
	Letter of 12-2-77	79
Carl R. Songer	Letter of 1-20-78	80
	Letter of 5-9-78	81
Daniel M. Thomas	Letter of 1-28-78	82
Jon S. Miller	Letter of 1-31-78	83
	Letter of 2-2-78	84
	Letter of 2-8-78	85
Bobby M. Francis	Letter of 2-10-78	86
	Letter of 2-16-78	87
	Acknowledgment Card of 2-23-78	88
	Letter of 2-20-78	89
Paul Magill	Motion to Inspect of 6-21-78	90-91
	Order of 6-23-78	92
	PSR of 6-7-77	93
	Letter of 6-23-78	94

		PAGE(S)
Clyde Foster	Order of 5-17-79	95
John E. Ferguson	Order of 8-3-79	96
	Memo of 8-22-79	97
	Memo of 8-24-79	98
William L. Thompson	Order of 8-3-79	99
Raleigh Porter	Order of 8-16-79	100
	Response of 8-16-79	101
Freddie Lee Hall	Order of 9-28-79	102
	Letter of 10-23-79	103
	Order of 1-15-80	104
	Letter of 1-18-80	105
Jimmy Lee Smith	Order of 10-15-79	106
	Letter of 10-26-79	107
Manuel Valle	Order of 10-15-79	108
	Letter of 10-25-79	109
Raymond L. Drake	Order of 11-26-79	110
	Letter of 12-5-79	111
Marvin E. Johnson	Order of 1-15-80	112
	Letter of 1-18-80	113
Leslie R. Jones	Order of 1-25-80	114
	Letter of 1-31-80	115
	Acknowledgment Card of 2-4-80	116
Rufus E. Stevens	Order of 4-10-80	117
	Letter of 4-30-80	118
James A. Morgan	Order of 5-21-80	119
	Letter of 6-3-80 with Acknowledgment Card of 6-9-80	120
	Letter of 6-9-80	121
Preston Junior Crum	Order of 6-9-80	122
	Letter of 6-16-80	123

		PAGE(S)
George V. Franklin	Order of 6-9-80	124
	Letter of 6-16-80	125
Frank Smith, Jr.	Order of 8-6-80	126
	Letter of 8-18-80	127
	Letter of 8-26-80	128
Rocco Surace & Anthony Antone	Affidavit of 8-28-80	129

ST. PETERSBURG TIMES

city AND state

Florida, 2-8
Bothwell, 3-8
Obituaries, 7-8

section B
TUESDAY, AUGUST 19, 1980

Justices saw 'confidential' psychological profiles of death row inmates

By KELLY SCOTT
St. Petersburg Times Staff Writer
© 1980, The St. Petersburg Times

TALLAHASSEE — Without the knowledge of defense attorneys, the Florida Supreme Court obtained psychological profiles of at least 20 men who were waiting on death row for the court to review their death sentences.

The practice apparently violated a U.S. Supreme Court decision giving all defendants a constitutional right to see and challenge any information used in determining their sentences.

"In some cases, we ended up with information we were not supposed to see," Justice Ben F. Overton conceded in an interview with *The St. Petersburg Times*.

But he said the court got the reports "inadvertently" and denied that justices actually used the reports in deciding whether the men should be given life in prison instead of death in the electric chair.

THE PROFILES were written by a psychologist in the State Department of Corrections after interviews and tests of the condemned men. The inmates were never told that the information might be used by the Supreme Court as it decided whether to uphold or overturn their sentences.

Overton, who was chief justice when the court obtained the reports, said the court had asked the Corrections Department for presentence reports, but sometimes received reports compiled after the sentencings.

Court records show, however, that the court specifically asked for the psychological profiles.

The reports were later removed from the court file, but not before some of the justices saw them.

"The appellate process was compromised," said Bruce Rogo, a professor of law at Nova University who represents a death row inmate. "It was error to go outside the record, especially without notifying opposing lawyers. It was wrong for that to happen. They have admitted that by stopping the practice."

Another defense lawyer, Ted Mack of Tallahassee, has already raised the issue with the court. On behalf of convicted killer Charles Dwight Messer, Mack is seeking a hearing to determine whether the court received a psychological report on Messer, whether any justices read it and when it was destroyed.

"I think there's a very serious legal and ethical question that the Supreme Court is going to have to answer to," Mack said in a recent interview.

It's possible that some of the defendants whose profiles were obtained by the court will get new sentencing hearings because of the mistake. The mistake will not affect the convictions themselves.

THOUGH SOME OF THE justices remembered looking at the reports, all of them said the reports had no effect on their decisions.

Alan Sundberg, who became chief justice last month, figures he read the reports. "I don't have any independent recollection," he said. "I'm sure I did."

Asked if he thought it was appropriate for him to read them, Sundberg said, "If you ask if it influenced my decision, no, I don't think it did. I'm more concerned about that transcript, what the record says ... I don't believe I was compromised, if that's your bottom line."

Justice Arthur England said he remembers seeing the reports in the files under a distinctive pink cover sheet, but he said he did

See PROFILES, 6-B

Profiles from 1-B

not read them. "The answer to your question is it would be pretty outrageous if we considered something like that, because it's not part of the record. And we haven't," England said.

"I might have seen one," said Justice James C. Adkins. "I would have casually overlooked it if I did. I've never read one. I wouldn't pay any attention to it. I would never request anything like that. I'm just not one of them that does that, requests anything further. I don't think we should."

Joseph W. Hatchett, who left the court in 1979 to become a federal appeals judge, would not comment. "You have to understand, there could be litigation on that matter, and I was a member of the court at the time," Hatchett said.

Justice Joseph A. Boyd said, "The only time we would do it (order the reports) would be if the trial record indicated there was some reason to."

BOYD SAID HE did not know that some attorneys were not aware their clients were being psychologically evaluated for the Supreme Court's review. "If the lawyer didn't get notified, I think that's very interesting. The court would like to know why that happened," Boyd said.

Even if justices did read the psychological reports, Justice Overton said, they wouldn't have considered them in determining the appropriateness of the sentence. "Judges are trained to make their consideration based solely on what is admissible," Overton said.

Fred Karl, the seventh member of the court when the reports were being received, could not be contacted.

Records of the Supreme Court and the Corrections Department show that 19 psychological reports on condemned murderers were sent to the court between November 1976 and May 1978. A psychological report on death row inmate Douglas Ray Meeks was requested and sent to the court as early as March 1976. Gov. Bob Graham signed a death warrant for Meeks on Jan. 9, 1980, but Meeks won a stay of execution.

Most of the men are still on death row, but the Supreme Court granted new sentencings or actually reduced the sentences to life for a few of the men. Among the cases are these:

- Carl Ray Songer, convicted of murdering a Florida Highway Patrol trooper in Citrus County in 1973 after escaping from an Oklahoma prison.
- Anthony Antone, convicted in the 1975 murder of Tampa policeman Richard Cloud.
- Arthur F. Goode III, convicted of killing an 11-year-old boy from Falls Church, Va. and a 9-year-old boy from Cape Coral.
- Daniel Morris Thomas, twice sentenced to death for his role as leader of the ski-mask gang, which terrorized towns in Central Florida in late 1975 and early 1976.

A PSYCHOLOGICAL REPORT was also requested and received on Jesse Lamar Hall, who was convicted in Pinellas County in 1976 of the murder of two Palm Harbor teenagers. Hall's conviction was reversed by the Florida Supreme Court late last year. Before a retrial, Hall pleaded no contest to murder and was sentenced to life in prison.

The requests for the reports apparently stopped in mid-1976, after an exchange between a defense attorney and Overton during oral arguments in the Paul McGill case.

McGill, 18, had been convicted and sentenced to death for robbing, raping and murdering a young female convenience-store clerk near Ocala. On appeal, Overton asked an assistant attorney general about McGill's reactions under stress and his suicidal tendencies.

"We have a copy of a psychological screening report and that screening report says in part that he feels very limited control in stressful situations ... and then also shows that he will become possibly suicidal," Overton said during the hearing.

Margaret Good, a Tallahassee public defender who was arguing McGill's case, told the justices she didn't have a copy of the report and didn't know it was part of the record in the case.

The next day she filed a motion to get a copy, and the court gave her one. But the same day, Ms. Good received a letter from Court Clerk Sid White stating that the psychological report had been "stricken" from the case.

Overton said he recalls that he was the one who discovered that the reports were in the files, but he does not recall whether it was because of the McGill case.

OVERTON SAID THE reports, including the one in the McGill case, were obtained by mistake during the court's effort to fulfill the edict of the U.S. Supreme Court in the case of *Gardner vs. Florida*.

Daniel Wilbur Gardner was convicted and sentenced to death for the stabbing murder of his wife in Citrus County. But the U.S. Supreme Court, while upholding the conviction, overturned the death sentence because the judge considered a "confidential" portion of a presentence report, which Gardner's attorneys had not been permitted to see.

The U.S. Supreme Court said Gardner was denied due process of law because he could not deny or explain information in the report before he was sentenced to death. The Florida Supreme Court had said that the practice was constitutional.

Gardner was resentenced to life in prison.

After the U.S. Supreme Court's ruling, Overton said, the Florida Supreme Court made a special effort to seek any information the trial judge had when he sentenced a

'In some cases, we ended up with information we were not supposed to see.'

—Justice Ben F. Overton

convicted man to death.

For example, a "Gardner order" form was printed and sent to each trial judge who sentenced a convicted man to death. The order asks the judge to return a sworn statement saying whether he or she considered any information that the defendant or his defense attorney didn't know about.

ANOTHER PART OF THE court's effort, Overton said, was to ask the Florida Department of Probation and Parole for any background report on the death row inmate, called a pre-sentence investigation (PSI) report, that the trial judge had.

"What we asked for was the PSI, and we ended up getting a post-sentence report and the psychologicals," Overton said. "It's not unusual that it (a psychological report) would be attached to the post-sentence report. That is not what we intended to have or what we should have had."

But the psychological reports were not attached simply as a matter of routine. Court Clerk White's office sent a separate letter asking for them.

One letter ordered the PSI, and copies of the letter were sent to prosecutors and defense attorneys.

The second letter went to the Department of Offender Rehabilitation, which has since been renamed the Department of Corrections. "This is to request a copy of the latest psychiatric evaluation made on the above-named inmate who is on death row." In only one case is there a notation that copies of the letter were sent to lawyers involved in the case, and that defense attorney says he never got the court's letter or a copy of the psychological report.

Overton said he did not direct White to send separate letters. "They were to get the necessary information, that's all," Overton said.

After he decided the court shouldn't have gotten the psychological reports, Overton said, he directed Sid White to "review everything in the files and make sure we didn't have anything that was done subsequent to sentencing."

WHITE, WHO IS IN charge of all court records, said Overton told him to remove all the reports from the files. The reports were destroyed, White said.

Overton could not explain why, if the requests were routine following the *Gardner* decision, psychological reports were requested on some death row defendants and not others. And the court requested at least five of the profiles before, rather than after, the U.S. Supreme Court's ruling in *Gardner*.

White says the assistant clerk who wrote the letters misunderstood his instructions and mistakenly wrote the letters requesting the psychological reports.

Overton later called *The Times* to say he had found the form letter from which the assistant typed the requests. It indicates that copies should be sent to all attorneys, Overton said. It was a clerk's error, he said, that no copies of the Supreme Court requests were actually sent to the lawyers.

"I'm not saying that people don't goof," Overton said. "Even newspapers make mistakes."

He added, "There was no intent to hide anything or no intent to get any information the lawyers didn't have."

In one of the cases the court was considering, there was a mention of a psychological evaluation done in concert with the pre-sentence investigation, Overton said. The court wanted to see that, and White's office interpreted that as an order to get psychological reports in all cases, he said.

Vernon Bradford, a spokesman for the Department of Corrections, confirmed that the Supreme Court requested the reports. There is no record, he said, of exactly how many were requested or when the practice stopped.

THE PRISON SYSTEM employs a full-time psychiatrist, a full-time clinical psychologist and two psychologists with master's degrees.

All prisoners, including death row inmates are tested when they enter the prison system and "from time to time" as part of a review of their progress, Bradford said. The prisoners are interviewed and given standardized tests. Their lawyers are not routinely notified.

These are the reports that were sent to the court, Bradford said.

"Now you have to consider, what are the legal consequences of that mistake?" said Rogo of Nova University. "Was there any harm caused? Each attorney will have to review his or her case, look at the whole record and measure this against it."

TAMPA TRIBUNE - WEDNESDAY, AUGUST 20, 1980

Justices Admit Access To Death-Row Inmate Reports

TALLAHASSEE (UPI) — Supreme Court justices admitted Tuesday they had access to psychological reports on 20 death-row inmates that they should not have seen while reviewing the appropriateness of the penalty in the cases — but denied it influenced their decisions on whether the men should live or die.

"I am satisfied to a moral certainty that the reports did not influence the outcome of any case," Chief Justice Alan Sundberg said in an interview.

"To the extent that anyone can demonstrate prejudice," he said, "the court will entertain appeals and we'll have to take it on a case-by-case basis."

Tallahassee attorney Ted Mack has raised the issue on behalf of convicted killer Charles Dwight Messer. He asked for a hearing to determine if the court received a psychological report on Messer and whether the justices read it.

"I think there's a serious legal and ethical question that the Supreme Court is going to have to answer to," he said.

If the court should find error, it would not affect the conviction, but only the sentence.

The St. Petersburg Times revealed in a copyrighted story Tuesday that the court, without the knowledge of defense attorneys, obtained psychological profiles of at least 20 men waiting on death row for the court to review their sentences. The reports were made by the Department of Correction's parole and probation section between 1976 and mid-1978.

The U.S. Supreme Court has ruled that the courts cannot use any information in sentencing a convicted murderer that is not also available to defense attorneys.

Justice Ben Overton was chief justice at the time the post-sentencing psychological reports were received. He said they were obtained by mistake by the clerk's office. When the error was discovered, he said, the reports were removed from the files and returned to the department.

Overton said the court wanted to be sure it had all the information available to the trial judge in sentencing a convicted killer to death rather than life in prison.

In one case, he said, reference was made to a psychological report that was not in the file.

"One judge (nobody now can remember which one) noticed it and asked the clerk to get the report," Overton said. One of the deputies interpreted the instruction to mean that psychological reports were to be required in all cases, rather than just the one.

Overton can recall reading only the report on the case which prompted the complaint. Sundberg can't recall any of them, but said if they were a part of the record, he must have read one or more of them.

"But I am confident it did not affect the outcome of a single case," he said.

Justice Arthur England recalled seeing the reports, but said he didn't read them, adding, "it would be pretty outrageous if we considered something like that because it's not part of the record. And we haven't." Justice James Adkins Jr. said he might have seen one or more but never read them. Justice Joe Boyd said he didn't know attorneys were unaware that their clients were being psychologically evaluated and wants to know why they weren't told.

Two other justices on the court at the time — Fred Karl and Joseph Hatchett — are no longer members. Karl is in private practice and Hatchett is a federal appeals judge.

One of the cases in which a report was requested was that of Douglas Ray Meeks for whom the governor signed a death warrant last January. Meeks won a stay of execution.

None of the 20 has been executed and most are still on death row. The court granted new sentencings or actually reduced the sentences to life for a few.

Among the cases are Carl Ray Songer, sentenced for killing a highway patrolman in Citrus County in 1973; Arthur Goode III, convicted of killing a young Cape Coral boy in 1976; Anthony Antone, sentenced in the 1975 murder of Tampa policeman Richard Cloud; and Daniel Thomas, leader of a ski-mask gang that terrorized central Florida with a series of killings in 1975.

RUBBER STAMPS

Challenge to death penalty

Papers barred, yet high court looked at them

BARBARA MALONE and KEN WALTON
Miami News Reporters

Defense attorneys across the state are preparing to attack the death sentences of all 131 people on Florida's death row, contending that the Florida Supreme Court looked at psychological reports on some of the condemned in violation of a U.S. Supreme Court ruling.

The defense lawyers say that the Florida justices violated the Supreme Court decision by looking at reports by prison psychologists without disclosing the evaluations to lawyers for the condemned.

That is grounds for overturning the sentences, said the lawyers, most of whom decline to be identified while the statewide challenge is being prepared.

"The U.S. Supreme Court has held that it is just not fair in a death case for a judge to base a death sentence on secret information — that a defense attorney has a right to know what the information is in order to argue against it," said Deborah Fins, an attorney with the NAACP Legal Defense Fund who is helping to coordinate the Florida appeal.

"If judges are making a decision about whether or not you live or die, you want to make sure that the information they are considering is accurate," Fins said.

The reports are based on mental examinations given by staff psychologists when inmates are first admitted to prison. Defense attorneys say death row inmates had no warning that what they told prison psychologists might later be used by a court in deciding whether they should live or die.

The justices acknowledge the court should not have had the reports, but say they never based a life-or-death ruling on one of them.

The defense lawyers claim the court wrongly:

- Decided on its own to obtain the reports, which weren't in trial court files.
- Didn't obtain them in all cases, and didn't explain what criteria it used in deciding when to obtain them.
- Didn't tell the lawyers on either side when it was obtaining them.

The defense lawyers say they don't know on how many occasions, or for how long, the court obtained the psychological reports in death cases.

Justice Ben Overton said the reports found their way into the Supreme Court files "inadvertently" because of an error by a deputy clerk. He said he asked the clerk to get a copy of a pre-sentence psychological report that had been considered by the trial judge but was not in the court file.

According to Overton, the deputy clerk misinterpreted his request, and began routinely ordering post-sentencing psychological reports made by staff psychologists at the Department of Corrections. Overton was chief justice at the time. Overton said he cannot remember the name of the deputy clerk.

Miami lawyer Robert Shevin, who as attorney general successfully argued the constitutionality of Florida's death penalty before the U.S. Supreme Court in 1976, said the attack is just a tactic to stall executions.

"Whenever you're dealing with the death penalty, those condemned to die are going to look for anything they can to delay the process," said Shevin.

He predicted that the legal attack might result in delaying executions "six months or a year," but that it would not result in any reversals of the death penalty.

Defense attorneys say they expect five members of the court to become witnesses. They are Chief Justice Alan Sundberg and Justices Overton, James Adkins, Joseph Boyd and Arthur England. The other two justices, Parker McDonald and James Alderman, were not on the court when it obtained the reports.

Two former justices who sat on the court when it had the reports also are expected to be called as witnesses. They are Joseph Hatchett, now a judge on the U.S. Fifth Circuit Court of Appeals, and Fred Karl, who is in private law practice.

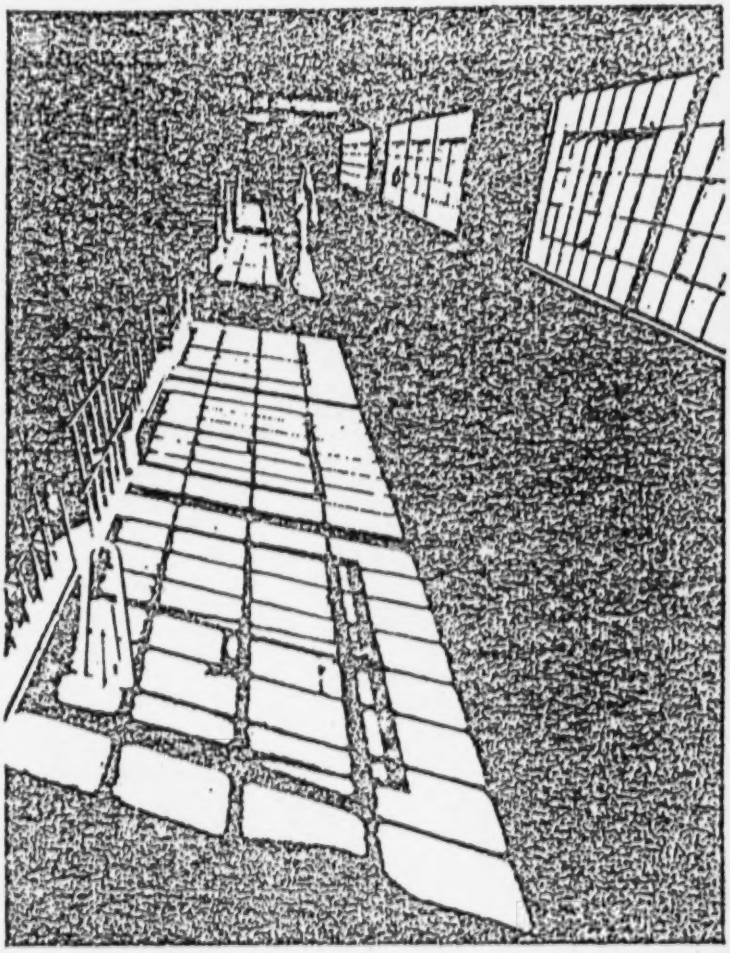
The St. Petersburg Times reported last month that the court in 1976-78 had looked at reports on some condemned men without disclosing them to defense attorneys.

"In some cases, we ended up with information we were not supposed to see," Justice Overton told the Times.

Justice Adkins told The Miami News he was opposed to the practice. "I didn't like what was going on," he said. "It looked to me like it was overreaching."

While several justices acknowledged that they read the reports while considering death sentences, they said they didn't rely on the reports in making decisions on executions.

Defense attorneys say the legal attack will be filed in both state and federal court. The challenge will contend that the court deprived death row inmates of due process of law because their lawyers couldn't explain or refute information in the reports.



The first defense attorney to learn of the practice was Assistant Public Defender Margaret Good of Tallahassee, who in mid-1978 was arguing against the death penalty on behalf of Paul McGill, an 18-year-old sentenced to die for robbing, raping and murdering a convenience-store clerk near Ocala.

Overton questioned Good about McGill's mental condition, referring to "a psychological screening report (which) says in part that he feels very limited control in stressful situations . . ."

Good told the court she did not have a copy of the report. She later filed a motion and obtained one.

The court later reduced McGill's sentence to life. It did not comment in its opinion on whether the psychological report had played a part in the decision.

The incident occurred more than a year after the U.S. Supreme Court held in March 1977, in *Gardner v. Florida*, that defense attorneys in death penalty cases are entitled to any confidential information relied on by the trial judge.

Daniel Gardner had been sentenced to death for stabbing his wife to death in Citrus County. The U.S. Supreme Court upheld his conviction, but overturned the death sentence because the trial judge considered "confidential" material not disclosed to the defendant's attorneys.

Since that time, defense attorneys from around the state have been posing information about death cases and have concluded that the psychological reports were considered by the Florida Supreme Court in at least 20, and possibly more, death cases.

Martha Hall, a former law clerk for Justice England when he was chief justice, told The Miami News that she was told to go through about 40 death row files in August or September of 1978 — shortly after Good had learned of the reports — and to pull out all psychological reports.

Hall, who is now general counsel for the Department of Environmental Regulation, said she found reports in about 30 files and removed them. She said that after collecting the reports in a manila folder, she believes she had them shredded.

Hall said she did not make a list of the defendants whose reports she removed, and that she cannot remember the names.

Hall said England's chief law clerk, Mike Rosen, told her to get rid of the reports. Rosen, who is now with a Tallahassee law firm, said he does not recall saying that.

England said he did not recall seeing any psychological evaluations, or ordering their removal from the file.

"I don't recall having seen a psychological evaluation, but that doesn't mean I haven't read one. I just don't remember," England said.

"I don't remember having a clerk remove the reports from the files, either. But if Marty (Martha Hall) says I told her to do it, I must have told her," England said.

Overton said he considers psychological reports important because a death sentence may be mitigated if the defendant was suffering from extreme mental disturbance or could not control his conduct. But when he discovered psychological reports that had not been provided to defense counsel were in the files, he said, he tried to rectify the situation.

"After I found out what happened I ordered the psychological evaluations pulled from the files because they did not belong there," Overton said.

During the period when the psychological reports were being sent to the Supreme Court, the court upheld the death sentence of John Spenkelink, who was executed in May, 1979. Spenkelink was the first — and so far the only — inmate to be executed in Florida since 1964.

Records in the Supreme Court clerk's office contain no indication that a psychological report on Spenkelink was ordered before his death sentence was upheld, according to deputy clerk Debby Cousseaux.

Hatchett said he expects the psychological reports to result in suits and he will have to excuse himself

Please see DEATH, 6A

DEATH, from 5A

from sitting as an appeals court judge because, "I'm sure to be a witness."

Adkins acknowledged seeing some of the reports, but said he "didn't pay any attention" to them. "The only thing I ever considered was the factual situation and the record that the trial judge had in front of him," Adkins said.

While Adkins said he disapproved of the court's obtaining the psychological reports, he said the fact that it did should not "becloud everything into a monumental issue that is going to turn the world upside down."

Sundberg said he remembers seeing some psychological evaluations in the files, and that he read them. "We are obliged to read a death case file from stem to stern," he said.

"I am convinced to a moral certainty that a psychological report did not affect my determination of a case because of the decision-making process I go through," Sundberg said.

Karl, who resigned from the court in April, 1978, said he could not remember whether he had seen any of the psychological reports. But, he said, "I do know that I never voted on a death case unless I could honestly say I had read every word that was available in the file."

Boyd said he "never saw any psychological reports and never read any."

"Somebody was smart enough, if those psychological reports were in there, to pull them out before they ever got to me," Boyd said.

Sid White, clerk of the Supreme Court, said he has no list of the defendants whose psychological reports were ordered, then later pulled from the files.

"You would have to go through each one of the files to look for a copy of the letter requesting the psychological report, and we have not done that," White said.

Chief Deputy Clerk Bernice Smilgin said letters requesting the reports were written by several different clerks and signed by White. Smilgin said she could not recall the name of the original clerk who got Overton's request for a report.

"We thought ordering the reports was a policy set up by the judges. We wouldn't do it on our own. We thought it was what the judges wanted," Smilgin said.

"When Justice Overton told us to stop, we stopped," she added.

Defense attorneys say searching for letters requesting the reports, as White suggested, would not show all cases in which the reports were obtained. Records at the Department of Corrections, spot-checked by The Miami News, show that in some death row cases, psychological reports were sent to the court without a written request.

Defense attorneys say they can't uncover the full extent of the practice until they take sworn testimony from the justices, their former law clerks, and deputy clerks.

If the justices should become witnesses, the case could be heard by Florida appeals court judges from around the state, or even circuit court judges.

Shevin, the former state attorney general, said he thought the attack would be relevant only in cases in which secret psychological reports had actually been read by the justices. "All of the rest of the attacks would be frivolous," he maintained.

"It's unfortunate there are these delays because if the death penalty is going to serve as a deterrent, it must be carried out," Shevin said, pointing out that although Gov. Graham has signed 12 death warrants, all but Spenkelink's have been stayed by appeals.

Graham signed two death warrants last week, ordering the executions of 25-year-old Lenson Hargrave of Miami and 30-year-old Carl Ray Songer of Citrus County. Hargrave was convicted of killing a Dade convenience store clerk during an aborted robbery in 1976; Songer was convicted of murdering a Florida Highway Patrol trooper in Citrus County in 1973.

Songer's court file shows that he is one of the condemned men whose secret psychological report was ordered from the Department of Corrections. But the file doesn't show whether the report was ever received.

Hargrave's court file contains no indication his psychological report was requested or received.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-6309

RAYMOND ROBERT CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RECEIVED
APR 19 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL COPY

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

MICHAEL J. KOTLER
Assistant Attorney General
Park Trammell Building
1313 Tampa Street
Suite 804
Tampa, Florida 33602

Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-6309

RAYMOND ROBERT CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The State of Florida, Respondent, files this response and moves that the writ of certiorari be denied.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 379 So.2d 97 (Fla. 1980), and is set out in Petitioner's Appendix A.

JURISDICTION

The opinion of the Supreme Court of Florida was filed November 21, 1979, and is set out in Petitioner's Appendix A. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR A STATEMENT OF PARTICULARS OF THE AGGRAVATING CIRCUMSTANCES ON WHICH THE STATE WOULD RELY, INFRINGING UPON PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHTS OF DUE PROCESS OF LAW AND NOTICE OF THE CHARGES AGAINST HIM.

II.

WHETHER THE TRIAL COURT CAN DEFINE AND CONTROL THE PETITIONER'S SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL AT THE EXPENSE OF HIS SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND AN IMPARTIAL JURY BY PERMITTING, OVER OBJECTION, THE PRESENCE OF THE ELECTRONIC MEDIA AT HIS TRIAL.

III.

WHETHER THE TRIAL COURT ERRED IN DENYING THE INDIGENT PETITIONER'S MOTION FOR APPOINTMENT OF AN EXPERT PSYCHIATRIST TO AID THE DEFENSE IN THE PREPARATION OF ITS CASE REGARDING THE PETITIONER'S GUILT AND REGARDING POTENTIAL MITIGATING CIRCUMSTANCES, THEREBY DENYING THE PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

STATEMENT OF THE CASE

The facts are sufficiently set forth in the Petition for Writ of Certiorari filed in this Honorable Court (Petition at pages 3-4) and will not be repeated here.

REASONS THE WRIT SHOULD NOT BE GRANTED

I.

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR A STATEMENT OF PARTICULARS OF THE AGGRAVATING CIRCUMSTANCES ON WHICH THE STATE WOULD RELY, INFRINGING UPON PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHTS OF DUE PROCESS OF LAW AND NOTICE OF THE CHARGES AGAINST HIM.

(A.) The decision of the Florida Supreme Court is in accord with federal decisions.

The issue which petitioner raises is not new. It has been raised before. In Spenkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1972), cert. den. 440 U.S. 976, the same contention was made. The Fifth Circuit said, inter alia:

> Spenkelink cites no case, federal or state, which requires the prosecutor to list in the indictment the aggravating circumstances on which he will rely in seeking the death penalty.
>
> * * * *
>
> As for Spenkelink's contention that he had no other notice of the aggravating circumstances on which the State would rely or which the trial would consider, we need only point to Fla.Stat.Ann. § 921.141(5), which defines the aggravating circumstances that may be considered by both judge and jury.
>
> (Text at 609-610)

The Fifth Circuit decided Spenkelink in 1978. Petitioner does not bring to the Court's attention one case decided

since, which conflicts with that decision.

Petitioner's reliance on Brady v. Maryland, 373 U.S. 83 (1963) and Gardner v. Florida, 430 U.S. 349 (1977) is misplaced. In Brady, the Court held that it was a denial of due process for the prosecution to fail to disclose material exculpatory matter to the defense. Petitioner did not seek exculpatory matter. He sought particulars as to the aggravating circumstances which the State would rely upon in seeking the death penalty. But, the Court has already held that there is no general constitutional right to discovery in a criminal case. Weatherford v. Bursey, 429 U.S. 545 (1977).

In Gardner the Court held that it was a denial of of due process to impose the death penalty, at least in part, on the basis of confidential information which was not disclosed to the defendant or his counsel. No such thing occurred in the instant case.

(B.) Florida's Death Penalty Statute sufficiently apprises a defendant as to the aggravating circumstances.

Section 921.141(5), Florida Statutes (1975), (A-1), sets out eight (8) aggravating circumstances. Under Florida Law only statutory aggravating circumstances may be considered in the weighing process. Elledge v. State, 346 So.2d 998 (Fla. 1977). When in the State of Florida a defendant is charged with a capital offense, he is on notice by virtue of the indictment, that he may face the supreme penalty if the court finds at least one of the enumerated statutory aggravating circumstances to exist. Of those eight (8), the first two relate to historical facts of which the defendant himself has personal knowledge and should require no particulars. The last six (6) relate to the crime for which the defendant has been convicted, evidence of which the defendant and his counsel heard in detail from the witnesses during the guilt phase of the trial.

II.

WHETHER THE TRIAL COURT CAN DEFINE AND CONTROL THE PETITIONER'S SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL AT THE EXPENSE OF HIS SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND AN IMPARTIAL JURY BY PERMITTING, OVER OBJECTION, THE PRESENCE OF THE ELECTRONIC MEDIA AT HIS TRIAL.

(A.) Certiorari should be denied because the issue raises matters *DEHORS* the record.

In essence, Petitioner is asking the Court to grant certiorari to determine matters *DEHORS* the record. This is so because he contends that, ". . . his counsel was especially unnerved by the camera's presence," and that ". . .the position of the camera being conspicuously located to the jury may have had some impact on the jury's analysis of the trial evidence." (Petition, P. 8)

There is no constitutional right to compel a private trial. Singer v. United States, 380 U.S. 24 (1965). Recognizing this, Petitioner endeavors to convince the Court to grant certiorari by asserting that his rights to effective assistance of counsel and an impartial jury were compromised by the presence of the cameras in the courtroom. Here again, as with respect to Issue III herein, the determination of this issue involves factual matters which are *DEHORS* the record; viz: whether in fact the camera affected his counsel's competence and whether it affected the jury's impartiality? Cardinale v. Louisiana, 394 U.S. 437 (1969).

III.

WHETHER THE TRIAL COURT ERRED IN DENYING THE INDIGENT PETITIONER'S MOTION FOR APPOINTMENT OF AN EXPERT PSYCHIATRIST TO AID THE DEFENSE IN THE PREPARATION OF ITS CASE REGARDING THE PETITIONER'S GUILT AND REGARDING POTENTIAL MITIGATING CIRCUMSTANCES, THEREBY DENYING THE PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

(A.) The judgment of the Supreme Court of Florida in denying Petitioner's contention under this issue was based on an independent and adequate State ground.

The decision of the Florida Supreme Court reveals that Petitioner raised the psychiatric issue in that Court via two separate contentions: one, that the trial court should have granted Petitioner's request for a psychiatrist in order that the defense might determine whether a possible defense of insanity existed; two, that he was entitled to the appointment of a psychiatrist to assist him in establishing extreme mental or emotional disturbance as a mitigating circumstance. Both of these contentions were denied by the Supreme Court of Florida on adequate State grounds.

The first was denied because Petitioner was attempting to circumvent Florida Rule of Criminal Procedure 3.210(3), (A-2, A-2a). The second was denied because no such request was made to the trial court. In Florida, an issue not raised in the trial court cannot be raised on appeal for the first time. Yost v. State, 243 So.2d 469 (Fla. 3d DCA 1971). The

grounds raised upon appeal must be the same as those relied upon at trial. Bertone v. State, 224 So.2d 400 (Fla. 3d DCA 1969).

(B.) The state of the record will be inadequate for this Court to properly consider the issue raised.

In Cardinale v. Louisiana, 394 U.S. 437 (1969), the Court held that, via certiorari, it will not decide a federal question that had not been raised, preserved or passed upon in the State court because, inter alia, questions not properly raised in the trial court will not be supported by an adequate record. Petitioner now contends that the denial of a "work product" psychiatrist denied him due process and equal protection of the laws. The Circuits are in general accord that denial of State-provided expert assistance does not violate due process or equal protection unless there is a showing that the assistance of an expert is necessary and that the defendant is unable to hire his own experts. Pedrero v. Wainwright, 590 F.2d 1383 (5th Cir. 1979). At least one Circuit also holds that a defendant must show prejudice in the denial. Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974). Unless the Court has an inclination toward holding that the denial of expert assistance constitutes a violation of due process or equal protection of the laws, even absent a showing of necessity or prejudice, this case is not in a proper posture for decision because, aforesaid, the issue was not properly preserved below.

CONCLUSION

Therefore, Respondent respectfully asks this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MICHAEL J. KOTLER
Assistant Attorney General

CHARLES CORCES, JR.
Assistant Attorney General
Park Trammell Building
1313 Tampa Street
Suite 804
Tampa, Florida 33602

Counsel for Respondent